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In The

SUPREME COURT OF THE UNITED STATES

RAYMOND L. NEAL, AVIATION ELECTRONICS TECHNICIAN AIRMAN, UNITED STATES NAVY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 10 USC § 920, the newly revised statute criminalizing sexual misconduct under the Uniform Code of Military Justice, violates due process by shifting to the defense the burden of disproving an element of the government's case.

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PETITION FOR A WRIT OF CERTIORARI

Airman Raymond L. Neal, United States Navy, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (CAAF) (App., *infra*, 1a-43a) is reported at 68 M.J. 289. The opinion of the Navy and Marine Corps Court of Criminal Appeals (NMCCA) is reported at 67 M.J. 675 (N-M. Ct. Crim. App. 2009). App. B, *infra* at 44a-61a.

JURISDICTION

The CAAF granted review of Petitioner's case and affirmed his conviction on January 22, 2010. A timely petition for reconsideration was denied on February 22, 2010. App. C, *infra*, 62a. The jurisdiction of this Court is invoked under 28 USC § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution is reproduced in App. D, *infra* at 63a.

The contested statute at issue, 10 USC § 920, is reproduced in App. E., *infra* at 64a-75a.

STATEMENT

1. The Statutory Change at Issue

The charge involved in this case, aggravated sexual contact in violation of Article 120(c), Uniform Code of Military Justice (UCMJ), codified at 10 USC § 920, involves a new offense enacted by Congress in 2006 as part of a sweeping revision to Article 120, the military's rape statute.[1] One of the apparent aims of this revision was to address most forms of sexual misconduct comprehensively under one article of the UCMJ.[2] In doing so, Congress revised the description of rape under Article 120 and added thirteen other offenses to the statute, including Article 120(c), aggravated sexual contact.[3]

The charge of aggravated sexual contact makes it criminal, in pertinent part, to engage in sexual contact by use of force.[4] Prior to the revision, the alleged misconduct in this case would have been charged as indecent assault under Article 134, UCMJ, 10 USC § 934.[5] "With respect to the assault element of [indecent assault], the government would have been required to prove that the accused acted

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[1] *See* National Defense Authorization Act for Fiscal Year 2006 (FY06 NDAA), Pub. L. No. 109-163, div. A, tit. V, § 552(a)(1), 119 Stat. 3136, 3257 (2006) (codified as amended at 10 USC § 920 (2006)).

[2] Drafter's Analysis, *Manual for Courts-Martial*, United States (MCM) A23-15 (2008 ed.).

[3] *See* Article 120, UCMJ, 10 USC § 920.

[4] *See* Article 120(c), UCMJ, 10 USC § 920

[5] MCM pt. IV, para. 63 (2005 ed.); *see also* Appendix A at 18a.

'without the lawful consent of the person affected.'"[6] Similarly, prior to the revision of Article 120, "lack of consent" was an element to be proven, along with the element of force, in order to convict on the charge of rape.[7] This element—"lack of consent"—was removed in the new legislation.[8] An affirmative defense of "consent," however, was created.[9] Under the new Article 120, "consent . . . [is] an affirmative defense for the sexual conduct in issue in a prosecution . . . [of] aggravated sexual contact," as well as any other charge alleging "force," including the charge of rape.[10] But to get the benefit of this affirmative defense, an accused must prove the defense by a preponderance of evidence.[11]

An additional revision to this legislation was definitional guidance as to what constitutes consent and force.[12] Consent is defined within the statute as "words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person."[13] The element of force is defined as:

> *[A]ction to compel submission of another* or to overcome or prevent another's resistance by . . . (C) physical

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[6] Appendix A at 18a; *see also* MCM pt. IV, para. 63 (2005 ed.).

[7] *See* MCM pt. IV, para. 45 (2005 ed.).

[8] *See* Article 120, UCMJ, 10 USC § 920.

[9] *See* Article 120(r), UCMJ, 10 USC § 920.

[10] *Id.*

[11] *See* Article 120(t)(16), UCMJ, 10 USC § 920.

[12] *See* Article 120(t)(5) and (14), UCMJ, 10 USC § 920.

[13] Article 120(t)(14), UCMJ, 10 USC § 920.

> violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct.[14]

2. The Charge that Arose from the Statutory Change

The government charged Petitioner with aggravated sexual contact by use of force, in violation of Article 120(e). On August 14, 2008, Petitioner filed a motion to dismiss this charge, arguing that the statute created an unconstitutional burden shift whereby the defense, by its burden to prove the affirmative defense of consent, would consequently be required to disprove the element of force.[15] On August 22, 2008, the government responded, conceding that the affirmative defense of consent, when applied to a case involving force, was unconstitutional.[16] On August 28, 2008, the military judge issued a written ruling prospectively announcing that if the issue of consent was raised at trial by the defense, the affirmative defense of consent would require Petitioner to disprove an implied element of the offense, and that this would be unconstitutional.[17] However, the military judge withheld his ruling on the constitutionality of the affirmative defense of consent until after the presentation of evidence at trial, waiting to determine whether the evidence would raise the

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[14] Article 120(t)(5), UCMJ, 10 USC § 920 (emphasis added).

[15] *See* Appellate Exhibit (AE) 17.

[16] *See* AE 18 at 7.

[17] *See* AE 19.

issue of consent.[18]

On September 11, 2008, at the conclusion of the presentation of evidence, the military judge found that evidence of consent had been raised.[19] In keeping with his prospective ruling, the military judge dismissed the charge as unconstitutional.[20] The next day, the government appealed this dismissal through an interlocutory appeal, pursuant to 10 USC § 862.[21]

On March 31, 2009, the NMCCA, in a published *en banc* opinion, granted the government's interlocutory appeal, finding that the military judge erred in dismissing the Article 120(e), UCMJ, charge.[22]

On May 15, 2010, the Judge Advocate General (JAG) of the Navy certified six issues to be decided by the CAAF, per the JAG's authority under 10 USC § 867(a)(2), including the constitutionality of the statute's burden allocation.[23] On January 22, 2010, a divided lower court, in a three-two decision, affirmed the decision of the NMCAA and found the statutory scheme to be constitutional.[24]

On February 1, 2010, Petitioner sought timely reconsideration of the CAAF's decision. On February 22, 2010, the CAAF denied that petition.[25]

[18] *See* AE 19.

[19] Record (R.) at 1023.

[20] R. at 1024.

[21] Appendix A at 10a.

[22] *See generally* Appendix B.

[23] *See* Appendix A at 3a to 5a.

[24] *See generally* Appendix A.

[25] Appendix C at 62a.

REASONS FOR GRANTING THE PETITION

The Due Process Clause of the Constitution requires that a defendant shall never be required to disprove an element of the government's case.[26] The new statutory scheme set forth in 10 USC § 920 violates this constitutional imperative by burdening the defense with proof of consent, which directly negates the government's element of force, as defined within the statute. Because force is defined by reference to a lack of consent, the two concepts are inextricably bonded; therefore proof of consent wholly, necessarily, and unconstitutionally negates an element of the government's case.

The lower court disagreed. Despite this definitional dependence, the lower court maintained that these concepts were independent, and further argued that to whatever extent consent does negate force, *Martin v. Ohio*[27] permits a statute to have such an overlap, as long as proper instructions are given. The lower court's decision ignores the definitional context of the statute, and extends this Court's *Martin* decision well beyond its intended scope. The *Martin* decision, while permitting overlap between an affirmative defense and an element, does not endorse a situation, like here, where the overlap is so complete that the defense evidence will entirely negate an element of the government's case.

Review by this Court is necessary to reaffirm the efficacy of this Court's decision in *Martin*, which is

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[26] *See* argument *infra* at 7.

[27] 480 U.S. 228 (1987).

threatened by the lower courts,' as well other jurisdictions' extension of that precedent to *all* cases of "overlap," regardless of whether an affirmative defense negates an element of the government's case. Furthermore, review is necessary to overturn an unconstitutional burden allocation that will threaten the liberty interests of thousands of Sailors, Marines, Soldiers and Airmen.

1. **This statute violates due process because it places a burden on the defense to disprove an element of the government's case.**

Due process requires the government prove every fact necessary to constitute the crime charged beyond a reasonable doubt.[28] "The burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted."[29] And, as this Court has stated in *Patterson v. New York*, while Congress may constitutionally allocate a burden onto the defense, it may not do so if that allocation "negative[s] any facts of the crime which the state is to prove in order to convict."[30] Put in plain words, a statute may not "shift to the defendant the burden of disproving any element of the state's case."[31]

Here, "aggravated sexual contact" under Article

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[28] *In re Winship*, 397 U.S. 358, 364 (1970).

[29] *Davis v. United States*, 160 U.S. 469, 487 (1895).

[30] 432 U.S. 197, 207 (1977); *see also Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975).

[31] *Martin*, 480 U.S. at 234.

120, UCMJ, does just that. This statute requires the government to prove the element of force, while also placing on the defense, through an affirmative defense, the burden to prove consent. And because force, as the statute defines it, requires a lack of consent, this statute places upon the defense a burden to disprove that element of the government's case. As Judge Ryan noted in her dissent to the lower court's decision, "[t]his Congress may not do."[32]

Without doubt, Congress has great authority to define crimes, allocate burdens, and, if they so choose, impose an affirmative defense upon the accused.[33] However, "[m]erely labeling something an affirmative defense does not mean the statute is constitutional. 'It must appear that the so-called defense does not in actuality negate any element of the crime.'"[34] Here, the affirmative defense of consent does not operate in the traditional sense of an affirmative defense, but rather, it serves to negate the government's element of force.

This is so because Congress has defined the terms in a manner that creates an impermissible conflict. And it is the definitions within a statute that dictate the functional nature of these so-called "affirmative defenses."[35]

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[32] Appendix A at 39a (Ryan, J. dissenting).

[33] *Patterson*, 432 U.S. at 207.

[34] *United States v. Clemons*, 843 F.2d 741, 752 (3d Cir. 1988) (citing 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 1.8, at 75 (1986)).

[35] *Holloway v. McElroy*, 632 F.2d 605, 628 (5th Cir. 1980) (finding federal courts will employ a functional analysis in determining whether an affirmative defense serves to negate an element); *see also* 1-303 Weinstein's Federal Evidence §

Thus, we look to the statutory definitions to determine whether the function of this affirmative defense actually negates the element of force. However, even before definitions are examined, it should be noted that pure logic supports that one who consents to something cannot be said to have been forced, and one who is forced to do something cannot be said to have consented to it. Each concept necessarily assumes the negative of the other. Regardless of that logic, Congress' definitions of the terms consent and force reiterate the inextricable nature of these concepts. Consent is defined, in pertinent part, as "words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person."[36] The element of force, as defined in the statute is:

> *[A]ction to compel submission of another* or to overcome or prevent another's resistance by . . . (C) physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct.[37]

Defined as such, to prove force, the government must show action done in the absence of a freely given

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303.06 (3)(a)(ii) ("[T]he constitutionality of statutes allocating the burden of proof seems to lie in the way the crime is defined by the statute. For example, the burden of proving self-defense may be shifted to the defendant if the statutes provide that self-defense does not negate an element of the crime.")

[36] Article 120(t)(14), UCMJ, 10 USC § 920.

[37] Article 120(t)(5), UCMJ, 10 USC § 920 (emphasis added).

agreement, *i.e.* some action that either compels submission or overcomes or prevents another's resistance by some means. To "compel" is "to drive or urge forcefully or irresistibly."[38] To "submit" is "to yield oneself to the authority or will of another."[39] If someone is compelled to submit, by definition, they are not "freely giv[ing their] agreement" to that action. Therefore, a lack of consent is an implied element under the definition of force. Likewise, the same can be said for someone whose resistance is overcome or prevented. Both of these concepts involve one who resists, which is "to exert oneself so as to counteract or defeat"—a synonym being "oppose."[40] All these terms are premised in the idea of nonconsensual action. One does not submit if agreeable, and one does not resist that which one wants.

In proving these acts of compelled submission, or overcome or prevented resistance, the government is thus burdened with showing these acts were not done via a "freely given agreement," *i.e.* the acts were done without consent. Consequently, this results in the defense's proof of consent negating the element of force. And because a statute may not "shift to the defendant the burden of disproving any element of the state's case,"[41] this statutory burden allocation violates due process.

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[38] *Merriam Webster's Collegiate Dictionary* 234 (10th ed. 2001).

[39] *Id.* at 1169.

[40] *Id.* at 994.

[41] *Martin* 480 U.S. at 234.

2. The lower court's analysis of the definitional independence of "force" and "consent" cannot be accepted.

The CAAF, in its decision below, denies both the logical and definitional nexus between consent and force, and thus finds that proof of force can be accomplished without regard to consent. The CAAF held:

> [t]he statute describes the prohibited act in terms of the degree of force applied to the alleged victim. Although the statute describes the degree of force in terms of the relative actions of the accused and the alleged victim, the prosecution is not required to prove whether the alleged victim was, in fact, willing or 'not willing.' If the evidence demonstrates that the degree of force applied by an accused constitutes 'action to compel' another person, the statute does not require further proof that the alleged victim, in fact, did not consent.[42]

This explanation ignores the context of the statute. It is precisely because the "statute describes the degree of force in terms of the relative actions of the accused *and the alleged victim*" that the government must show an unwillingly received act. If the government need prove a "degree of force

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[42] Appendix A at 33a.

applied" that constitutes "action to compel another," it must show that the action reached a level in which the recipient did not consensually agree to that action. Though the act is viewed from the standpoint of the accused, the act must be objectively viewed as effecting compulsion on the alleged victim. And one cannot come to that conclusion without finding that the act was committed without consent. A panel of members (a military jury), therefore, in reaching a conclusion that the force element was met, must necessarily be satisfied that the degree of force used rose to a level whereby the victim did not consent to the action. And because evidence of consent would directly negate that such a degree of force was present, this is an unconstitutional burden allocation.

3. The lower court's reliance upon *Martin v. Ohio* to salvage this statute is misplaced.

The CAAF additionally determined that this Court's holding in *Martin* saves this statute:

> The possibility that evidence pertinent to the affirmative defense of consent could raise a reasonable doubt about the element of force in a particular case does not render the statute unconstitutional.[43]

This determination fails to note an important

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[43] Appendix A at 33a (citing *Martin*, 480 U.S. at 234).

distinction. Unlike *Martin*, this statute does not involve the mere "possibility" that the affirmative defense could raise a reasonable doubt or involve some degree of potential overlap. Rather, it involves a situation where proof of consent will always raise a reasonable doubt about the element of force.

This very distinction has been noted before in federal practice.[44] In *Humanik v. Beyer*, the Third Circuit, in analyzing whether a New Jersey diminished capacity statute was constitutional, outlined the distinction between two types of cases. The first is the *Patterson/Martin*-type cases, in which "the ultimate issues posed by one of the elements of the offense and by an 'affirmative defense' are different, but nevertheless are such that subsidiary facts are relevant to both issues."[45] The second type of cases are those in which "the element of the offense and the so-called 'affirmative defense' pose the same ultimate issue and a state places the burden of persuasion on the defendant with respect to that ultimate issue."[46] As noted by the *Humanik* court, the former cases are constitutional, as long as the jury is instructed that the evidence may be used to attack the element of the crime, regardless of whether the affirmative defense burden is met.[47] The latter cases are unconstitutional, as "the relevance of the subsidiary facts in th[ose] case[s] are the same and the sole significance of the defendants' evidence concerning the so-called

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[44] *See Humanik v. Beyer*, 871 F.2d 432 (3rd Cir. 1989).

[45] *Id.* at 440.

[46] *Id.*

[47] *Id.*

'affirmative defense' is to create a reasonable doubt about the existence of an element of the offense."[48] Citing *Clemons*, the *Humanik* court noted:

> Merely labeling something an affirmative defense does not mean the statute is constitutional. "[I]t must appear that the so-called defense does not in actuality negate any element of the crime." 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 1.8, at 75 (1986).[49]

The CAAF may not use the rationale of *Martin* to salvage this statute because the statutory scheme does not involve *just* an overlap of some subsidiary facts shared by the defense and the element. Nor has the CAAF made an attempt to explain under what scenario the affirmative defense of consent would not serve to negate an "action to compel submission." That is so because the overlap in this statute is a complete overlay, where proof of consent will always negate that an action rose to the level of compulsion. The CAAF has therefore rendered impotent this Court's holding in *Martin* by erasing the distinction noted in *Humanik* between "mere overlap" statutes and "affirmative-defense-negating-an-element" statutes.

4. Review of this petition would provide this Court an opportunity to reaffirm the proper

[48] *Humanik*, 871 F.2d at 440.

[49] *Id.* (citing *Clemons*, 843 F.2d at 752).

scope of *Martin v. Ohio*, which has been misinterpreted by military courts and other jurisdictions as allowing any overlap between an element and an affirmative defense, regardless of whether the affirmative defense negates an element.

By citing *Martin v. Ohio*, but failing to adequately delineate when consent evidence would not necessarily negate the element of force, the lower court threatens to disembowel the central prohibition reinforced by *Martin*– that the defense shall never be required to disprove an element of the government's case. If a hypothetical statute had as an element "x," and an affirmative defense of "not x," this statute, despite clear constitutional proscription, might now be found permissible by merely citing *Martin* and not explaining the depth of overlap. Without an explanation as to how "not x" fails to negate the element "x," a court cannot simply cite *Martin*, claim potential overlap, and ignore the fact that the affirmative defense completely negates the element. Yet that is what the lower court has done. This scenario flouts this Court's precedent and eviscerates its import.

The central prohibition in *Martin* must be re-affirmed, as this is the third jurisdiction to misuse *Martin* to judicially sidestep the notion that the defense shall never be required to disprove an element of the government's case. In the military now, as well as in the State of Washington and the District of Columbia, *Martin* is being championed as a statutory savior in the context of novel sexual misconduct statutes that place the burden of proving

consent on the defense in cases requiring proof of force, even though this burden allocation involves the defense negating an element of the government's case.

In the State of Washington, the sexual assault statute similarly has removed "lack of consent" as an element, but still requires the government to prove "forcible compulsion."[50] And, as the State Supreme Court conceded in *State v. Camara*, forcible compulsion has retained the concept of consent as its "conceptual opposite."[51] However, that court found, despite this concession: "[f]ollowing *Martin*, it appears that assignment of the burden of proof on a defense to the defendant is not precluded by the fact that the defense 'negates' an element of a crime."[52] That court thus concluded that *Martin* had materially changed burden-allocation jurisprudence, casting "substantial doubt about the correctness of this 'negates' analysis and [thereby] declin[ing] to apply it in [that] case."[53] It therefore found that any legislative burden allocation, even one that burdens the defense with disproof of one of the government's elements is permissible as long as the legislature intended to change the statute in that way. Because *Martin* specifically disapproves a statute that "shift[s] to the defendant the burden of disproving any element of the state's case," *Camara* has misinterpreted this Court's decision in *Martin*, and more importantly, the constitutional imperative

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[50] Revised Code of Washington § 9A.44.010 et seq.

[51] *State v. Camara*, 781 P.2d 483, 486 (Wash. 1989).

[52] *Id.*, at 487.

[53] *Id.*

upon which it relied—that the government is required to prove each element beyond a reasonable doubt.[54]

Similarly, the District of Columbia's newest sexual assault statute requires the government to prove the element of force, while providing for an affirmative defense of consent that need be proven by a preponderance of the evidence.[55] Under the D.C. statute, similar definitions to Article 120 exist for consent and force.[56] In *United States v. Russell*, the District of Columbia Court of Appeals found this statute to be constitutional, holding that *Martin* allowed for immense legislative deference and citing it for the proposition that an element and affirmative defense may overlap.[57] In doing so, it did

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[54] Of note, two Justices from the Washington State Supreme Court have called for overturning *Camara* on the grounds of this unconstitutional burden allocation. *See State v. Gregory*, 147 P.3d 1201, 1257-58 (Wash. 2006) (J. Fairhurst concurring with J. Sanders concurrence) ("[I]n the context of first degree rape, forcible compulsion (an element of the offense) is absolutely incompatible with consent. The two cannot coexist. Nevertheless the jury was instructed that it was the *defendant's* burden to prove 'consent' by a preponderance of the evidence, notwithstanding the State's burden to prove forcible compulsion beyond a reasonable doubt. This makes no sense. It is a contradiction. The due process clause of the Fourteenth Amendment to the United States Constitution prohibits shifting the burden to the defendant to prove or disprove an element of the crime. *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). *Camara* was wrongfully decided and harmfully so because it allows an unconstitutional shifting of the burden of proof. It should be overruled.")

[55] D.C. Code §§ 22-4100 et seq (1996 Repl).

[56] D.C. Code §§ 22-4101(4) and (5).

[57] *Russell v. United States*, 698 A.2d 1007 (D.C. 1997).

not discuss whether the affirmative defense negates an element of the government's case, thereby omitting that important prohibition in its analysis. That court defended its holding by stating,

> [t]he Supreme Court has declined to set forth a single test or specific guidelines for measuring 'the limits of due process,' *i.e.* for determining when a legislature has exceeded its constitutional authority in defining the elements of an offense and allocating the burdens of proof.[58]

This is not the case, as *Martin* and *Patterson*, while setting forth some deference to legislatures when potential overlap exists, still held that a statute may not "shift to the defendant the burden of disproving any element of the state's case."[59] Again, similar to the Supreme Court of Washington, the D.C. Appellate Court simply dismissed that portion of *Martin* that was inconvenient to the statute's unconstitutionality, and then boldly blamed this Court for its lack of guidance.

Even if these various courts applied Justice Powell's interpretation of the functional test he believed would flow from the majority's decision in *Patterson*, these statutes impose an unconstitutional burden allocation:

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[58] *Id.*, at 1017 (citing *Schad v. Arizona*, 501 U.S. 624, 637 (1991)).

[59] *Martin*, 480 U.S. at 234; *Patterson*, 432 U.S. at 207.

> The test the Court today establishes allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime. The sole requirement is that any references to the factor be confined to those sections that provide for an affirmative defense.[60]

Even under this extreme interpretation, this statute fails because the language of the statute implicates "lack of consent" as a component that need be proved to prove the element of force.

This Court's holding in *Martin* is not only being misinterpreted by this and other jurisdictions, it is being utilized as precedent to support a constitutional violation. Review by this Court is necessary to clear up this confusion and reassert the true contours of *Martin*.

5. This statute must be overturned to protect the liberty interests of thousands of servicemembers affected by this impermissible burden allocation.

Review is also necessary because substantial numbers of people are having their due process rights violated by this unconstitutional burden allocation. The essence of the violation here is

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[60] *Patterson*, 432 U.S. at 223 (Powell, J. dissenting).

encapsulated within the dissent's concluding paragraphs:

> Burden allocation is of fundamental importance: "[W]here one party has at stake an interest of transcending value -- as a criminal defendant in his liberty -- th[e] margin of error is reduced as to him by the process of placing on the [government] the burden . . . of persuading the factfinder . . . of his guilt beyond a reasonable doubt." *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958). But "where the defendant is required to prove [or disprove a] critical fact in dispute" in a criminal proceeding, "the likelihood of an erroneous . . . conviction," increases. *Mullaney*, 421 U.S. at 701. This is why the Supreme Court has reaffirmed the reasonable-doubt standard time and again and why courts must remain vigilant in upholding the standard against legislative schemes that require defendants to persuade the factfinder as to the elements of a crime. *See Martin*, 480 U.S. at 233-34; *Patterson*, 432 U.S. at 207, 210; *Mullaney*, 421 U.S. at 701.[61]

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[61] Appendix A at 43a (Ryan, J., dissenting) (bracketing in original).

Petitioner asks the same of this Court by this petition—to overturn a statute that increases the likelihood that a Sailor, Marine, Soldier, or Airman will be convicted upon proof lower than beyond a reasonable doubt.

Furthermore, this liberty interest is of no small consequence. A conviction for aggravated sexual contact may result in as much as twenty years of confinement.[62] And a conviction for rape accomplished by force, which involves the same burden allocation, carries a maximum sentence of death.[63] Moreover, thousands of servicemembers will be prosecuted under this unconstitutional statute. In fact, since this new statute went into effect, courts-martial for sexual assault crimes have dramatically increased, from 181 in 2007, to 317 in 2008, to 410 in 2009.[64] This burden allocation will continue to threaten the liberty interests of a battalion-sized group of servicemembers per year by saddling the defense with disproving what the statute defines as a component of force and what has always been the "critical fact in dispute" in sexual

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[62] MCM, Appendix 12-4 (2008 ed.).

[63] *Id.*

[64] The Department of Defense, FY07 Report on Sexual Assault in the Military (March 15, 2008) at page 19, Table 3 (600 actions taken; 181 of which were courts-martial); The Department of Defense, FY08 Report on Sexual Assault in the Military (March 15, 2009) at 37, Table 4 (832 actions taken; 317 of which were courts-martial); The Department of Defense, FY09 Report on Sexual Assault in the Military (March 2010) at 64, Exhibit 6 (983 actions taken; 410 of which were courts-martial), at http://www.sapr.mil/index.php/annual reports.

assault cases[6]---that one person committed a sexual act against another's wishes.

And beyond this particular statute, and the people affected therewith, the misapplication of *Martin* in the State of Washington and the District of Columbia have effectively sanctioned similar unconstitutional burden allocations, which will affect the liberty interests of many, many more individuals.

CONCLUSION

If, as the D.C. court suggests, there is no guidance as to a proper threshold dividing legislative prerogative from a due process violation, review by this Court is necessary to tender guidance in this ever increasing area of confusion. If *Martin* is clear, as Petitioner suggests, and an overlap is prohibited when it involves negation of an element, review is appropriate to overturn this statute, as well as to reaffirm the proper limits of *Martin*, so that the trend toward misapplication of that precedent is reversed, and legislatures are on clear notice of the

[6] Historically, "lack of consent" has been an element of rape since the dawn of common law tradition. Sir Matthew Hale, a renowned seventeenth century jurist, defined rape as unlawful carnal knowledge of a woman against her will. Hale, HISTORIA PLACITOUM CORONAE [THE HISTORY OF THE PLEAS OF THE CROWN] 627 (2d ed. 1847). The removal of "lack of consent" is only a recent movement. Cassie Spohn & Julia Horney, *Rape Law Reform: A Grassroots Revolution and Its Impact* at 20, 23 (1992) (explaining that element of "against her will was integral to all rape statutes until reform movements in the 1960s and 1970s).

due process limitations in allocating burdens onto a defendant.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES, Appellee
v.
Raymond L. NEAL, Aviation Electronics Technician Airman
U.S. Navy, Appellant

No. 09-5004
Crim. App. No. 200800746

United States Court of Appeals for the Armed Forces

Argued June 24, 2009
Decided August 31, 2009

EFFRON, C.J., delivered the opinion of the Court, in which BAKER and STUCKY, JJ., joined. RYAN, J., filed a separate opinion concurring in part and dissenting in part, in which ERDMANN, J., joined.

Counsel:

For Appellant: Lieutenant Dillon J. Ambrose, JAGC, USN (argued).

For Appellee: Major Elizabeth Harvey, USMC (argued); Colonel Louis J. Puleo, USMC, and Brian Keller, Esq. (on brief).

Amicus Curiae for the United States Air Force Appellate Government Division: Lieutenant Colonel Jeremy S. Weber, Captain Naomi N. Porterfield, and Gerald R. Bruce, Esq. (on brief).

Military Judge: Mario H. De Oliveira

Chief Judge EFFRON delivered the opinion of the Court.

The present case concerns a decision by the military judge to dismiss a charge in a pending court-martial. Upon appeal by the Government under Article 62, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862 (2006), the United States Navy-Marine Corps Court of Criminal Appeals reversed the military judge and remanded the case to the Judge Advocate General of the Navy for further proceedings before the court-martial. *United States v. Neal*, 67 M.J. 675, 680-82 (N-M. Ct. Crim. App. 2009). The Judge Advocate General of the Navy certified the case for our review under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2)(2006).

The charge under appeal, aggravated sexual contact in violation of Article 120(e), UCMJ, 10 U.S.C. § 920(e), involves a new offense enacted by Congress in 2006 as part of a comprehensive revision of Article 120. *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, div. A, tit. V, § 552(a)(1), 119 Stat. 3136, 3257 (2006) (codified as amended at 10 U.S.C. § 920 (2006)). The 2006 legislation revised the description of rape under Article 120 and added thirteen other offenses to the statute, including Article 120(e), aggravated sexual contact.

In pertinent part, the new statute makes it an offense to engage in sexual contact by use of force. See infra Part III.A (describing Article 120(e) and the related provisions of Article 120). In contrast to prior law, which required the government to prove lack of consent as an element of the offense, see infra

Part III.A.1, the new statute expressly states that consent is "not an issue" in a prosecution for specified offenses under Article 120, including the offense of aggravated sexual contact. See infra Part III.A.3.b (describing Article 120(r) and the related provisions of Article 120).

At trial, the military judge interpreted Article 120(e) as requiring the defense to disprove an implied element -- lack of consent -- and dismissed the charge on the ground that the statute unconstitutionally shifted the burden of proof on an element from the Government to the defense. On review under Article 62, the Court of Criminal Appeals concluded that the statute did not contain an implied element and did not relieve the Government of its burden to prove all elements beyond a reasonable doubt. *Neal*, 67 M.J. at 680-82. The Judge Advocate General of the Navy certified the following issues for our review:

> I. WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED IN FINDING IT HAD JURISDICTION OVER THIS ARTICLE 62, UCMJ, APPEAL, WHERE THE APPEAL WAS TAKEN AFTER THE CASE WAS ADJOURNED AND THE MEMBERS DISMISSED.
>
> II. DESPITE THE LANGUAGE OF ARTICLE 120(r), UCMJ, WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS CORRECTLY HELD THAT THE ARTICLE DOES NOT PROHIBIT THE

ACCUSED FROM INTRODUCING EVIDENCE OF CONSENT IN ORDER TO NEGATE AN ELEMENT OF THE OFFENSE.

III. CONCERNING THE AFFIRMATIVE DEFENSE SET FORTH IN ARTICLE 120(d)(16), WHETHER THE NAVYMARINE CORPS COURT OF CRIMINAL APPEALS CORRECTLY HELD THAT CONGRESS CONSTITUTIONALLY ALLOCATED, TO THE ACCUSED, THE BURDEN OF PROVING CONSENT BY A PREPONDERANCE OF THE EVIDENCE.

IV. WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS CORRECTLY HELD THAT "LACK OF CONSENT" IS NOT AN IMPLICIT ELEMENT OF ARTICLE 120 CRIMES, INCLUDING THE CHARGED OFFENSE, GIVEN THE DEFINITION OF "FORCE" IN ARTICLE 120(d)(5), AND THUS ARTICLE 120, UCMJ, DOES NOT UNCONSTITUTIONALLY SHIFT THE BURDEN TO THE ACCUSED TO "DISPROVE AN ELEMENT OF THE OFFENSE."

V. WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS CORRECTLY HELD THAT THE EVIDENCE TRIGGERED THE

AFFIRMATIVE DEFENSE OF CONSENT AS DEFINED IN ARTICLE 120(t)(16), UCMJ, DESPITE THE FACT THAT THE APPELLANT FAILED TO ACKNOWLEDGE THE OBJECTIVE ACTS OF THE ALLEGED OFFENSE.

VI. WHETHER THE FINAL TWO SENTENCES OF ARTICLE 120(t)(16), UCMJ, WHICH ALLOWS FOR CONSIDERATION AS TO WHETHER THE GOVERNMENT HAS DISPROVED THE AFFIRMATIVE DEFENSE OF CONSENT BEYOND A REASONABLE DOUBT, AFTER THE ACCUSED HAS PROVED THE DEFENSE BY A PREPONDERANCE OF THE EVIDENCE, CREATE A LEGALLY IMPOSSIBLE BURDEN ALLOCATION.

For the reasons set forth below, we affirm the decision of the Court of Criminal Appeals. Part I summarizes the trial and intermediate appellate proceedings. Part II addresses the first certified issue, which concerns the jurisdiction of the Court of Criminal Appeals. Part III addresses the balance of the certified issues in light of the pertinent constitutional and statutory considerations regarding Article 120. Part IV sets forth our decision.

I. BACKGROUND

A. TRIAL PROCEEDINGS

1. Appellant's Motion to Dismiss the Charge

The charge in the present case alleges that Appellant --

> engage[d] in sexual contact, to wit: by using his hands to fondle the breasts and vaginal area of Airman [_____] and by thrusting his penis against the buttocks of the said Airman [_____], by using physical strength sufficient that she could not escape the sexual contact.

Following arraignment, Appellant moved to dismiss the charge, challenging the constitutionality of the new Article 120 on a number of grounds, including the contention that the affirmative defense provisions of the statute unconstitutionally shifted the burden of proof from the Government to Appellant. *See Martin v. Ohio*, 480 U.S. 228 (1987). The military judge stated that he would not address that question until he determined whether the evidence raised the affirmative defense of consent.

After the parties completed presentation of evidence on the merits, the military judge summarized the evidence pertinent to the issue of consent. He briefly noted that Airman [_____] testified that Appellant had engaged in the charged conduct without her permission. The military judge provided a more detailed summary, as follows, regarding Appellant's testimony concerning his physical interaction with Airman [_____]:

> 1. Pg 852 (transcript). AN Neal indicated that the alleged victim

consented to a back and neck rub due to a back injury she had previously sustained.

2. Pg 854 After 20-30 minutes of rubbing the alleged victim's back, she reached up with her right hand and interlocked her fingers with his left hand and pulled herself up onto him. After having her back against his chest, he asked if she still wanted him to continue massaging her back.

3. She did not respond to his question, shook her head "no" and while biting her lip thrust her hips towards his pelvic area. As she continued to grind against him, he "got caught up in the moment" and reciprocated by grinding up against her.

4. Pg 856 (transcript) He moved his right hand around the front of her stomach along her belt line and then moved it down against the inside of her thingh [sic] and started touching her around her vaginal area on the outside of her jeans.

5. At one point he unbuckled her belt, as he did this she pivoted her hips and raised them off the bed towards his hand. Her pantns [sic] and brazier [sic] were never unfastened.

6. Pg 857 (transcript) After unfastening

> her belt, he stuck his hand down until he touched the waistband of her underwear. As he started to insert his hand down in the front of her jeans, [another Airman in the room] woke up and began to sit up. Then AR [____] leaned towards him and wispered [sic], "I think we should stop now." He immediately withdrew his hand and leaned up against the headboard, she did the same and turned on the T.V.

The military judge determined that the affirmative defense of consent had been raised by Appellant's description of the physical contact and his description of the alleged victim's response. The military judge interpreted the statute as requiring the prosecution to prove lack of consent by the victim. In that light, the military judge viewed the affirmative defense of consent under the statute as "element based" and concluded that the statute unconstitutionally required the defense to carry the burden of proof with respect to an element of the offense. On that basis, he dismissed the charge and its specification.

2. Proceedings Following Dismissal of the Charge

The members of the court-martial panel remained outside the courtroom during the proceedings on the motion to dismiss the charge. *See* Article 39(a), UCMJ, 10 U.S.C. § 839(a) (2000). Immediately following the military judge's ruling, he directed the bailiff to recall the panel, and the members entered the courtroom at 10:23 a.m. After informing the members that he had dismissed the

charge and its specification, he said:

> You have now completed your duties, and are discharged with my sincerest thanks. Please leave all the exhibits behind, if you have any in your possession. You may take your own personal notes with you, or leave those behind, and they will be destroyed by the court reporter or bailiff.

With respect to discussing the case, the military judge said:

> To assist you in determining what you may discuss about this case, now that it is over, the following guidance is provided. When you took your oath as members, you swore not to disclose or discover the vote or opinion of any particular member of this court, unless required to do so in the due course of law.

The military judge notified the members of the possibility that he, or another military judge, might require them to state their views in court:

> This means you may not tell anyone any way -- well how you voted in this case wouldn't be appropriate, but what your opinion is, unless I, or another judge, require you to do so in court.

He then discussed the opportunity to provide counsel with feedback:

> You are each entitled to this privacy. Other than that, you are free to talk to anyone else in this case, including myself, the attorneys, or anyone else. And I'm sure counsel in this case would very much appreciate any feedback that you have on their advocacy and performance in court. That's one of the great ways that we can have our counsel improve on their trial advocacy.

You, however, can decline to participate in such discussions, if that is your choice.

The military judge concluded with the following:

> Members, once again, I want to thank you sincerely for your participation and patience in this case. You've been a very attentive panel. I appreciate your patience during all our 39(a) sessions, and you may depart the courtroom and resume your normal duties.
>
> Thank you very much.

The members withdrew from the courtroom, and at 10:27 a.m. the military judge stated: "This court martial is adjourned."

A day later, the trial counsel filed notice that the Government had elected to appeal the ruling dismissing the charge. *See* Article 62(a)(1)(A), UCMJ, 10 U.S.C. § 862(a)(1)(A) (2006) (authorizing the Government to appeal an "order or ruling of the military judge which terminates the proceedings

with respect to a charge or specification"). Subsequently, the Government filed its appeal of the military judge's ruling at the Court of Criminal Appeals.

3. Review by the Court of Criminal Appeals

The Court of Criminal Appeals conducted an en banc review of the Government's interlocutory appeal. *See* Article 66(a), UCMJ, 10 U.S.C. § 866(a) (2006). Following briefing and oral argument, the court granted the Government's interlocutory appeal. *Neal*, 67 M.J. at 682. At the outset of its opinion, the court considered, and rejected, Appellant's contention that the Government waived the right to appeal by not requesting a delay before the military judge took action to dismiss the charge and discharge the members. Id. at 677; see infra Part II (discussing the jurisdiction of the Court of Criminal Appeals in the present case).

The lower court then addressed the merits of the military judge's ruling on the constitutionality of the statute, concluding that the military judge erred by dismissing the charge. The court concluded that "in this aggravated sexual contact prosecution, proof of the element of force does not require proof of 'lack of consent,' and the affirmative defense of consent does not unconstitutionally shift the burden of proof to the defense." *Neal*, 67 M.J. at 682; see infra Part III (discussing the merits of the decision by the military judge to dismiss the charge of aggravated sexual contact).

II. JURISDICTION OF THE COURT OF CRIMINAL APPEALS
(Certified Issue I)

The first certified issue concerns the lower court's jurisdiction over the Government's appeal. We review jurisdictional questions de novo. *See United States v. Henderson*, 59 M.J. 350, 351-52 (C.A.A.F. 2004). Appellant asserts that the Government waived its right to appeal by not requesting a delay in the proceedings under Rule for Courts-Martial (R.C.M.) 908. Appellant also argues that the court-martial ceased to exist because the military judge adjourned the court and discharged the members. According to Appellant, the military judge's ruling is not subject to a Government appeal under these circumstances because the case has become final, thereby precluding interlocutory review.

The Court of Criminal Appeals held that "[t]he military judge's statement to the members that they were 'discharged' following 'termination of the proceedings' does not deprive this court of jurisdiction to determine this Government's appeal." *Neal*, 67 M.J. at 677. The court also "decline[d] to address the legal efficacy of potential future proceedings as not ripe for review." *Id.* We agree.

A. THE NOTICE OF APPEAL UNDER ARTICLE 62

Article 62(a)(1)(A) governs interlocutory government appeals "[i]n a trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged . . . ." The statute includes authority for the government to appeal an "order or ruling of the military judge which terminates the proceedings with respect to a charge or specification." *Id.*

The statute contains a notice requirement accompanied by a timing limitation: "An appeal of an

order or ruling may not be taken unless the trial counsel provides the military judge with written notice of appeal from the order or ruling within 72 hours of the order or ruling." Article 62(a)(2), UCMJ.

R.C.M. 908(b)(1) provides additional authority for the prosecution to request a delay in trial proceedings during the seventy-two hour period for filing an appeal:

> After an order or ruling which may be subject to an appeal by the United States, the court-martial may not proceed, except as to matters unaffected by the ruling or order, if the trial counsel requests a delay to determine whether to file notice of appeal under this rule. Trial counsel is entitled to no more than 72 hours under this subsection.

Appellant contends that R.C.M. 908(b)(1) reduces the statutory seventy-two hour period provided under Article 62 for the Government to file a notice of appeal. Under Appellant's theory, R.C.M. 908(b)(1) requires the Government to request a delay as soon as the military judge issues a ruling in order to preserve the seventy-two hour period for filing a notice of appeal. According to Appellant, the prosecution waived the statutory seventy-two hour period by not making a formal request for delay during the few minutes that transpired between issuance of the military judge's ruling and the adjournment of the court-martial.

Neither the statute nor the rule requires the prosecution to take any such action. The statute provides the prosecution with an unqualified

seventy two hour period in which to file a notice of appeal. R.C.M. 908(b)(1) does not diminish that time period or otherwise condition the availability of the full seventy-two hour period upon filing a request for delay. The rule, which addresses the flow of court-martial proceedings, provides that certain aspects of the proceedings will be stayed during the seventy-two hour period "if" trial counsel requests a delay. In the absence of such a request, the proceedings will continue. As such, the rule offers trial counsel an opportunity to delay the proceedings during the seventy two hour period if the prosecution wishes to preserve the status quo with respect to matters affected by the ruling or order. As noted in the Drafters' Analysis, the rule "provides the trial counsel with a mechanism to ensure that further proceedings do not make an issue moot before the Government can file notice of appeal." *Manual for Courts-Martial*, United States, Analysis of the Rules for Courts-Martial app. 21 at A21-58 (2008 ed.) (*MCM*).

In the present case, the trial counsel filed a notice of appeal within twenty-four hours of the military judge's ruling. The absence of a request for delay did not waive the prosecution's right to do so.

B. STATUS OF THE COURT-MARTIAL PANEL

In a related argument, Appellant contends that the prosecution's failure to request a delay made it possible for the military judge to discharge the members. Appellant further contends that once the military judge discharged the members, the court-martial ceased to exist and the military judge's ruling on the charges became final. In Appellant's view, the proceedings were thereby terminated, thus

precluding an interlocutory appeal under Article 62.

We do not agree with Appellant's view of the procedural posture of this case. In the military justice system, the authority of the military judge in a court-martial does not cease upon the discharge of the members. The military judge retains control over a court-martial until the record is authenticated and forwarded to the convening authority for review. *See* R.C.M. 1104. Until this point, even after discharge of the members and adjournment of the court martial, the military judge may take actions such as: reconsidering rulings, R.C.M. 905(f); reconvening the court-martial to correct an erroneous sentence announcement, R.C.M. 1007(b); calling a session to clarify an ambiguous sentence imposed by either the military judge or the members, R.C.M. 1009(c); and directing post-trial sessions, R.C.M. 1102. These authorities illustrate that a court-martial does not cease to exist upon discharge of the members, and a case remains in an interlocutory posture so long as the military judge has the power to take action under the UCMJ and Rules for Courts-Martial.

C. POTENTIAL DISQUALIFICATION OF THE MEMBERS

Appellant also contends that the court-martial has become final because the action of the military judge in permitting the panel members to discuss the case with counsel precludes further proceedings. At this stage of the proceedings, a determination as to the effect of the military judge's actions upon the proceedings would be premature. The defense has filed an affidavit regarding events following discharge of the members, but there has been no

authoritative factfinding proceeding to ascertain what actually transpired. The information regarding discussions between counsel and members comes from an appellate affidavit signed by trial defense counsel. The members themselves have not submitted affidavits, nor have they been questioned. On this record, it would be inappropriate at this point of the proceedings to conclude that some or all of the members have been disqualified. Even assuming that one or all of the members should be disqualified, the military judge would then have the opportunity to consider whether such members may be replaced under R.C.M. 505(c). To the extent that excusal of members might lead to motions raising mistrial or potential former jeopardy concerns, those matters should be considered in light of briefing by the parties before the military judge and any factfinding that the military judge might find necessary. Excusal of members is a standard procedure in a court-martial, and the possibility of excusal and related concerns does not transform the status of a court-martial from an interlocutory to a final proceeding. At the present time, the military judge has not had the opportunity to engage in factfinding, or to consider any related issues concerning replacement, mistrial, or former jeopardy. *See* R.C.M. 505, 905, 907(b)(2)(C).

To the extent that Appellant relies on cases from civilian trials in which a declaration of a mistrial followed by discharge of a jury has been held to terminate the proceedings, *see, e.g., Camden v. Circuit Court of the Second Judicial Circuit*, 892 F.2d 610, 616 n.7 (7th Cir. 1989), we note that there has been no declaration of a mistrial in the present case. We further note that this case remains in an interlocutory posture and that discharge of the panel

members does not necessarily preclude reassembly. Accordingly, we conclude with respect to the first certified issue that the Court of Criminal Appeals had jurisdiction to review the Government's appeal of the military judge's decision to dismiss the charge. The remaining certified issues, which we discuss in the next section, involve matters of constitutional and statutory interpretation pertaining to the burden of proof under the new Article 120.

III. CONSTITUTIONAL AND STATUTORY CONSIDERATIONS

The defense brief provides the following concise description of the issue before us: "Appellant alleges, and the trial judge found, that the statutory scheme set forth in Article 120, UCMJ, violates due process by necessarily placing a burden on the defense to disprove an element of the Government's case." In this section, we assess the military judge's ruling in light of the statutory text and applicable constitutional considerations. The constitutionality of a statute is a question of law we review de novo. *United States v. Disney*, 62 M.J. 46, 48 (C.A.A.F. 2005).

Part A summarizes the statutory context of the new Article 120, focusing on the offense at issue in the present appeal -- aggravated sexual contact under Article 120(c). Part B provides background on the constitutional considerations applicable to the relationship between the elements of an offense and affirmative defenses. Parts C, D, and E discuss these considerations in light of the constitutional and statutory interpretation issues regarding the new Article 120 raised by the present appeal.

A. STATUTORY CONTEXT

1. Sexual Misconduct Under Prior Law

Congress enacted the offense of aggravated sexual contact in 2006 in the course of amending Article 120. *See infra* Part III.A.2. Under prior law, the offense of rape required proof that the accused committed "an act of sexual intercourse by force and without consent." *See* Article 120, UCMJ, 10 U.S.C. § 920 (2000) (amended in 2006). Many other forms of sexual misconduct were charged under prior law as conduct prejudicial to good order and discipline or as service discrediting conduct under Article 134, UCMJ, 10 U.S.C. § 934 (2000). For example, the alleged misconduct in the present case might have been charged under prior law as an indecent assault under Article 134. MCM pt. IV, paras. 63 (2005 ed.). With respect to the assault element of that offense, the government would have been required to prove that the accused acted "without the lawful consent of the person affected." *Id.* paras. 63.b(1), 63.c., 54.c(1)(a).

2. Aggravated Sexual Contact Under the New Article 120

Article 120(c) states:

> Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact, and

may be punished as a court-martial may direct.

By its terms, the offense of aggravated sexual contact incorporates statutory provisions governing the offense of rape under Article 120(a). The definitions in Article 120(t) govern the terms of Article 120(a) and the incorporated provisions of Article 120(e). Under the statute, the elements of rape, along with the definitions of force and sexual contact, transform noncriminal sexual contact into a criminal offense – aggravated sexual contact by force. Taken as a whole, these provisions require the government to prove the following in a prosecution for aggravated sexual contact by force:

(1) The accused engaged in "sexual contact" with another person by touching "the genitalia, anus, groin, breast, inner thigh, or buttocks of the other person." Articles 120(e), 120(t)(2), UCMJ.

(2) The accused engaged in such contact "with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person." Article 120(t)(2), UCMJ.

(3) The accused "caus[ed] another person of any age to engage in" such contact by "using force against that other person." Articles 120(a)(1), 120(a)(2), UCMJ.

(4) The use of force consisted of "action to compel submission of another" or "to overcome or prevent another's resistance," and the use of force involved application of "physical . . . strength . . . sufficient that the other person could not avoid or escape the sexual conduct." Article 120(t)(5), UCMJ.

3. Consent Under the New Article 120

The amendment to Article 120 deleted the phrase "without consent" from the statute. The new Article 120 addresses the subject of consent in several respects.

a. The definition of consent

The definition of consent in Article 120(t)(14) contains three components. The first explains the meaning of "consent" under Article 120:

> The term "consent" means words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person.

The second component of the definition identifies several circumstances excluded from the definition of consent:

> An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent.

The third component of the definition, which is not at issue in the present appeal, identifies

circumstances in which an individual cannot give consent under Article 120, including persons under sixteen years of age and persons "substantially incapable" of "appraising the nature of the sexual conduct at issue" because of specified mental or physical circumstances.

The term "mistake of fact as to consent" also is a defined term. *See* Article 120(t)(15), UCMJ. Mistake of fact is not at issue in the present appeal.

b. Consent as an affirmative defense

Article 120(r), entitled "Consent and Mistake of Fact as to Consent," sets forth three principles regarding consent. First, the provision states: "Lack of permission is an element of the offense in subsection (m) (wrongful sexual contact)" -- an offense that is not at issue in the present appeal. Second, Article 120(r) sets forth the general proposition that "[c]onsent and mistake of fact as to consent are not an issue, or an affirmative defense, in a prosecution under any other subsection . . . ." Third, the provision contains an exception pertinent to the present case, noting that consent and mistake of fact as to consent "are an affirmative defense for the sexual conduct in issue in a prosecution under subsection (a) (rape), subsection (c) (aggravated sexual assault), subsection (e) (aggravated sexual contact), and subsection (h) (abusive sexual contact)."

c. The definition of "affirmative defense"

The definition of "affirmative defense" in Article 120(t)(16) contains both descriptive and procedural components. The descriptive portion states that an

"affirmative defense" is "any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts."

The procedural component contains two parts. The first states: "The accused has the burden of proving the affirmative defense by a preponderance of the evidence." The second states: "After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist."

B. THE ALLOCATION OF BURDENS OF PROOF WHEN EVIDENCE IMPLICATES AN ELEMENT OF THE OFFENSE AND AN AFFIRMATIVE DEFENSE

The Due Process Clause of the Constitution, U.S. Const. amend. V, protects a defendant from conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *see* R.C.M. 920(e)(5). The Constitution precludes shifting the burden of proof from the government to the defense "with respect to a fact which the State deems so important that it must be either proved or presumed" in order to constitute a crime. *Patterson v. New York*, 432 U.S. 197, 215 (1977).

A legislature may redefine the elements of an offense and require the defense to bear the burden of proving an affirmative defense, subject to due process restrictions on impermissible presumptions of guilt. *Id.* at 205-06, 210, 215. A statute may place the burden on the accused to establish an

affirmative defense even when the evidence pertinent to an affirmative defense also may raise a reasonable doubt about an element of the offense. *See Martin*, 480 U.S. at 234.

In *Martin*, the Supreme Court observed that its review of the statute took into account "the preeminent role of the States in preventing and dealing with crime." *Id.* at 232. *Martin* also noted "the reluctance of the Court to disturb a State's decision with respect to the definition of criminal conduct and the procedures by which the criminal laws are to be enforced in the courts, including the burden of producing evidence and allocating the burden of persuasion." *Id.* An overlap between the evidence pertinent to the affirmative defense and evidence negating the prosecution's case does not violate the Due Process Clause when instructions "convey to the jury that all of the evidence, including the evidence going to [the affirmative defense], must be considered in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime." *Id.* at 232-36.

Appellate courts have addressed the overlap identified in *Martin* with respect to statutes under which evidence at trial potentially pertains to both (1) a fact on which the defense bears the burden of persuasion, and (2) a matter that is subsidiary to a fact on which the prosecution bears the burden of persuasion. In such a case, the instructions to the jury must reflect "sensitivity to th[e] dependent relationship between the two [distinct] factual issues." *Humanik v. Beyer*, 871 F.2d 432, 441 (3d Cir. 1989).

In *Humanik*, the United States Court of Appeals for the Third Circuit considered instructions under state law regarding evidence of a mental disease or

defect. *Id.* at 433. Under the instructions, the evidence could be considered by the jury: (1) to determine whether the defense proved the existence of mental disease or defect by a preponderance of the evidence for purposes of establishing a defense; and (2) as subsidiary evidence with respect to the element of intent, an issue on which the prosecution bore the burden of proof beyond a reasonable doubt. *Id.* at 435. The court found a due process violation in the sequential structure of the instructions. *Id.* at 442. The court noted the likelihood that the jury would first determine the issue of whether the defendant established the fact of mental disease or defect by a preponderance of the evidence. Id. If the jury determined that the defendant failed to establish this fact by a preponderance of the evidence, the court concluded that the evidence would play no role in the jury's deliberations with respect to the issue of intent, a matter on which the state had the burden of proof beyond a reasonable doubt. *Id.* As such, the court viewed the instructions as an unconstitutional filter upon consideration of evidence pertinent to an element of the offense. *Id.* at 443; *accord Kontakis v. Beyer*, 19 F.3d 110, 115 (3d Cir. 1994) (finding a due process violation in instructions that "failed to allow for the possibility that [the defendant's] mental disease and defect evidence, although not rising to the level of being more probable than not, created a reasonable doubt as to whether he had the requisite intent to commit the offense").

In *Russell v. United States*, 698 A.2d 1007 (D.C. 1997), the District of Columbia Court of Appeals considered a sexual misconduct statute with an affirmative defense component. *Id.* at 1008. In language similar to the statute under consideration

in the present appeal, the legislation under review in *Russell* made it an offense for a person to engage in or cause another person to engage in a sexual act through various means, including the use of force. *See id.* at 1009. The legislation also created an affirmative defense of consent, with the defense bearing the burden of persuasion by a preponderance of the evidence. *Id.* The court identified a critical change in the focus of attention in sexual misconduct cases under the statute:

> The new sexual abuse statute . . . was intended to change the focus of the criminal process away from an inquiry into the state of mind or acts of the victim to an inquiry into the conduct of the accused. To this end, the new provisions do not include "lack of consent" as an element of the offense.

Id.

The defendant in *Russell* objected at trial to the statutory provision under which he bore the burden of proof on the affirmative defense, and he also objected to the instructions given by the trial judge regarding consent and the burden of proof. *Id.* at 1010. On appeal, the District of Columbia Court of Appeals held that the instruction was defective because the jury was not "expressly instructed that it may consider the affirmative defense evidence when it determines whether the government has met its burden to prove all the elements of the offense beyond a reasonable doubt." *Id.* at 1015-16 (citing *Humanik*, 871 F.2d 432).

Although the Court of Appeals found a constitutional deficiency in the instruction, the court

rejected a defense challenge to the constitutionality of the statute and remanded the case for retrial. *Id.* at 1016-17. The court concluded that the statutory affirmative defense, which placed upon the defense the burden of proving consent by a preponderance of the evidence, did not offend the due process clause under *Martin*. *Id.* After noting that "the legislature did not exclude consent evidence as relevant to the government's burden of proof on the elements of the offense," *id.* at 1016, the court concluded that the statute did not "preclude the jury from considering the defendant's consent evidence as relevant to the government's burden to prove the elements of the offense." *Id.* at 1017. The court also noted with approval "the fact that the affirmative defense of consent focuses on something within the knowledge of the accused that he may fairly be required to prove -- that the words or overt actions of the complainant reasonably indicated that the complainant freely agreed to engage in the sexual act." *Id.*; *see also Hicks v. United States*, 707 A.2d 1301, 1303-05 (D.C. 1998) (remanding a case for further proceedings in light of an instructional error regarding the burden of proof); *Mozee v. United States*, 963 A.2d 151, 161 (D.C. 2009) (affirming a conviction under the statute on the grounds that an instructional defect in the case with regard to the burden of proof did not affect the appellant's substantial rights under a plain error analysis).

Under *Russell*, the opportunity for a jury to consider evidence that may raise a reasonable doubt about an element does not shift the burden to the defense to disprove that element. The burden of proof as to all elements remains on the prosecution. A properly instructed jury may consider evidence of

consent at two different levels: (1) as raising a reasonable doubt as to whether the prosecution has met its burden on the element of force; and (2) as to whether the defense has established an affirmative defense. As such, the statute does not offend the Due Process Clause under *Martin*.

C. CONSENT UNDER ARTICLE 120

1. The relationship between consent and the facts necessary to constitute a crime under Article 120(e)

The 2006 amendment to Article 120 removed lack of consent as an element of rape and its related offenses. *See supra* Part III.A. The text of Article 120(e) and the incorporated provisions of Articles 120(a) and 120(t) do not set forth lack of consent as an element of the offense. *See id.* The Supreme Court has "observed that '[t]he definition of the elements of criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.'" *Dixon v. United States*, 548 U.S. 1, 7 (2006) (alteration in original) (quoting *Liparota v. United States*, 471 U.S. 419, 424 (1985)). Congress has broad authority to define the elements of offenses under the constitutional power to make rules for the government and regulation of the armed forces. U.S. Const. art. 1, § 8, cl.14; *see Parker v. Levy*, 417 U.S. 733, 750 (1974); *see also Weiss v. United States*, 510 U.S. 163, 177 (1994).

When sexual abuse by members of the armed forces occurs within a military organization, it can have a devastating impact on the good order and discipline essential to the conduct of military

operations. When sexual abuse by deployed military personnel involves civilians, it can undermine relationships with the local population critical to our Nation's military and foreign policy objectives. These factors illustrate the importance of recognizing the broad authority of Congress to regulate the conduct of military personnel. That authority includes the power to define rape and its related offenses in a manner that does not require proof on the subject of consent, notwithstanding the traditional requirement in military and civilian law for such proof.

Aside from any unique considerations applicable to legislation governing the rights and responsibilities of military personnel, we note that the statute before us reflects similar legislation in the civilian sector. As discussed in Part III.B, *supra*, the District of Columbia has enacted a similar statute. With respect to that legislation, the District of Columbia Court of Appeals observed that the statute "was intended . . . to change the focus of the criminal process away from an inquiry into the state of mind or acts of the victim to an inquiry into the conduct of the accused." *Russell*, 698 A.2d at 1009.

Under Article 120(e), as under the District of Columbia statute, the prosecution need not prove the absence of consent in order to obtain a conviction. If the court-martial panel, like a civilian jury, is convinced beyond a reasonable doubt by competent evidence -- such as the testimony of an eyewitness -- that the accused engaged in sexual contact by applying the degree of force described in Article 120(e), then the panel may return a finding of guilty as to aggravated sexual contact. In short, under the structure of the amended statute, the absence of consent is not a fact necessary to prove the crime of

aggravated sexual contact under Article 120(c). See Neal, 67 M.J. at 678.

2. Consent as a potential subsidiary fact under Article 120(c)

As the District of Columbia Court of Appeals observed in *Russell*, 698 A.2d at 1013, evidence that the alleged victim consented to the charged sexual contact is relevant to the jury's determination of whether the prosecution has proved the element of force beyond a reasonable doubt. The court further held that failure to provide appropriate instructions on the relevance of consent violates the Due Process Clause of the Constitution. *Id.* at 1016.

In Article 120(r), Congress stated that consent is not "an issue . . . in a prosecution under" designated provisions of Article 120, including Article 120(c). The phrase "an issue" in Article 120(r) is susceptible to a number of interpretations, including a broad and narrow view. Read broadly, the phrase "an issue" could be interpreted as providing that consent is never "at issue" or "in issue" in a prosecution under Article 120 except when the defense meets its burden of persuasion to establish an affirmative defense. Such a reading would raise a substantial conflict with the Supreme Court's application of the Due Process Clause in *Martin* because it would preclude consideration of consent evidence as a potential subsidiary fact with respect to an element of the offense. *See supra* Part III.B. Read narrowly, however, the provision could be interpreted as providing that consent is not "an issue" -- a discrete matter -- that must be proved beyond a reasonable doubt as an element of the offense. In that regard, we note that the statute refers to when consent is

"an issue" and does not state that consent is never "in issue" or "at issue" except as an affirmative defense. As such, the statement in the legislation that consent is not "an issue" may be interpreted narrowly as emphasizing that consent is not an element, thereby underscoring and reinforcing the legislation's deletion of the prior requirement that the prosecution prove beyond a reasonable doubt that the accused acted "without consent" from the alleged victim. Under the narrow interpretation, the provision would not preclude treating evidence of consent as a subsidiary fact potentially relevant to a broader issue in the case, such as the element of force. That interpretation, which would not conflict with *Martin*, also would be consistent with *Russell*, under which evidence of a subsidiary fact may be considered as bearing upon the prosecution's burden to prove the element of force.

We decline to adopt a broad interpretation that would raise a direct conflict with *Martin*, a Supreme Court decision applicable to criminal proceedings, when a narrow interpretation can avoid such a conflict. *See* 2A Norman J. Singer & J. D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 45:11 (7th ed. 2008). We interpret Article 120(r) narrowly as underscoring and reinforcing the effect of the 2006 legislation in terms of deleting the prior requirement for the prosecution to prove the absence of consent beyond a reasonable doubt. We do not interpret Article 120(r) as a prohibition against considering evidence of consent, if introduced, as a subsidiary fact pertinent to the prosecution's burden to prove the element of force beyond a reasonable doubt.

D. CONSIDERATION OF CERTIFIED ISSUES II-

VI

The issues certified by the Judge Advocate General refer to the decision of the Court of Criminal Appeals, but in substance the certified issues address the ruling of the military judge on the constitutionality of Article 120. In that light, we focus on the ruling issued by the military judge. *See United States v. Shelton*, 64 M.J. 32, 37 (C.A.A.F. 2006).

1. The limited scope of interlocutory review

In considering the certified issues, we note the limitations on the scope of our review imposed by the interlocutory posture of the present appeal under Article 62, UCMJ. At the present stage of the proceedings, the parties have not made closing arguments on the merits of the charged offense; the military judge has not issued final instructions; the parties have not waived any instructions; and the members have not returned findings on the charged offense. In that setting, our review is limited to those matters necessary to assess the military judge's decision to dismiss the charge. Other portions of the military judge's ruling, such as the military judge's rationale for rejecting various aspects of the defense motion to dismiss, may provide useful context but are not before us for decision during interlocutory review.

2. The constitutionality of the affirmative defense (Certified Issue IV)

Appellant contends that the military judge correctly dismissed the charge because lack of

consent is an "implicit element" in the offense of aggravated sexual contact. Appellant bases this theory on the definition of force in Article 120(t)(5), which, in the context of the charge in the present case, requires proof that the accused used "action to compel submission of another or to overcome or prevent another's resistance" by "strength . . . applied to another person." According to Appellant:

> If someone is compelled to submit, by definition they are not willing participants in the action, and therefore a "lack of consent" is implicit. Likewise, the same can be said for someone whose resistance is overcome or prevented. Both of these concepts assume resistance, which is an active attempt to prevent something from happening. One does not submit if willing, one need not be overcome if willing, and one does not resist that which one wants. Proving the compelled submission, or the overcome or prevented resistance, the Government is thus burdened with showing these acts were not "freely given agreement[s]," Article 120(t)(14), i.e., it was done with a "lack of consent."

Appellant's contention suggests that Congress engaged in a futile act in passing legislation that deleted the phrase "without consent" from Article 120 and listed the offenses in which consent is not "an issue." In Appellant's view, these actions had no effect because the statutory definition of force reinserted "without consent" as an "implicit element" in the statute. From Appellant's perspective, the

primary focus of the statute is not on the force applied by the accused but on the mental state of the alleged victim, requiring the prosecution to prove that the alleged victim was "someone" who was "not willing."

We disagree. Like the statute considered by the District of Columbia Court of Appeals in *Russell*, Article 120 focuses on the force applied by an accused, not on the mental state of the alleged victim. *See supra* Parts III.B-III.C. The statute describes the prohibited act in terms of the degree of force applied to the alleged victim by the accused. Although the statute describes the degree of force in terms of the relative actions of the accused and the alleged victim, the prosecution is not required to prove whether the alleged victim was, in fact, willing or "not willing." If the evidence demonstrates that the degree of force applied by an accused constitutes "action to compel" another person, the statute does not require further proof that the alleged victim, in fact, did not consent. *See supra* Part III.A.2. Congress, in defining force from the perspective of the action taken by the alleged perpetrator, did not reinsert "without consent" as an "implicit element" in Article 120. The possibility that evidence pertinent to the affirmative defense of consent could raise a reasonable doubt about the element of force in a particular case does not render the statute unconstitutional. *See Martin*, 480 U.S. at 234. With respect to Issue IV, as certified by the Judge Advocate General of the Navy, we conclude that the military judge erred in treating lack of consent as an element of the offense and in concluding that Congress established an unconstitutional element-based affirmative defense in Article 120.

3. Consideration of consent evidence under Article 120(e)(Certified Issues II and III)

Issues II and III raise questions about treatment of consent evidence under Article 120, both with respect to the prosecution's burden of proving its case beyond a reasonable doubt and the defense burden of proving an affirmative defense by a preponderance of the evidence. The military judge considered both aspects of consent evidence in addressing the motion to dismiss the charge.

As discussed in Part III.C, *supra*, the statute does not preclude consideration of consent evidence by a court-martial panel when determining whether the prosecution has proven the elements of the offense beyond a reasonable doubt, and it permits consideration of such evidence with respect to the affirmative defense of consent. If such evidence is introduced, the military judge must instruct the members to consider all of the evidence, including the evidence of consent, when determining whether the government has proven guilt beyond a reasonable doubt. *See Martin*, 480 U.S. at 232-36. In doing so, the military judge must be mindful of both the content and sequential structure of the instructions. *See Russell*, 698 A.2d 1015-16; *Humanik*, 871 F.2d at 441-43.

We note that the present appeal does not involve a challenge to a ruling of the military judge regarding the admissibility of consent evidence, nor does it involve a challenge to the argument of counsel with respect to such evidence. In light of the interlocutory posture of this case, no panel instructions regarding consent evidence have been given or waived. Until the military judge has

addressed both the content and sequence of instructions, a determination as to whether the statute is unconstitutional as applied to Appellant would be premature.

4. Evidence concerning the affirmative defense of consent (Certified Issue V)

Certified Issue V asks whether the lower court erred in treating the evidence of record as sufficient to invoke the affirmative defense under Article 120. The military judge treated the evidence of record as sufficient to invoke the affirmative defense for purposes of ruling on the motion to dismiss the charge. We view treatment of the evidence by the Court of Criminal Appeals in the same light. None of the decisions in the present case, including our own, constitute a final decision regarding the evidence in this case, including any evidence subject to consideration as evidence of consent. At this stage in the proceedings, as noted earlier, no instructions have been waived or given with respect to any matter asserted to be evidence of consent. As the content and sequence of the military judge's instructions are necessary to determine the proper consideration of any consent evidence, *see Humanik*, 871 F.2d at 441-43, it would be premature at this point to address the manner in which the military judge should treat any evidence of consent in the present case.

5. The burdens of proof regarding affirmative defenses under Article 120(t)(16) (Certified Issue VI)

Certified Issue VI concerns the procedural

aspects of Article 120(t)(16) in terms of the relationship between the burdens of the prosecution and defense with respect to an affirmative defense. In the course of denying that portion of the defense motion concerning the relative burdens of the parties, the military judge identified interpretative considerations and concluded that those matters could be addressed through appropriate instructions without dismissing the charge. He did not rely upon that ruling as a basis for his separate decision to dismiss the charge. The scope of our review in the present case under Article 62 is limited to the military judge's ruling dismissing the charge. We note that our decision in the present case does not preclude the parties from requesting that the military judge give fresh consideration to the question of whether the relative procedural burdens under Article 120(t)(16) raise interpretative issues that should be addressed through instructions or other appropriate remedies.

E. CONCLUSION

In summary, the Constitution permits a legislature to place the burden on the defendant to establish an affirmative defense, even if the evidence necessary to prove the defense also may raise a reasonable doubt about an element of the offense. *See Martin*, 480 U.S. at 234; *supra* Part III.B. If such evidence is presented, the judge must ensure that the factfinder is instructed to consider all of the evidence, including the evidence raised by the defendant that is pertinent to the affirmative defense, when determining whether the prosecution established guilt beyond a reasonable doubt. *See Martin*, 480 U.S. at 232-36; *Humanik*, 871 F.2d at

441-43; *Russell*, 698 A.2d at 1015-16; *supra* Part III.B.

Congress has broad authority to regulate the conduct of members of the armed forces, including the power to define the elements of offenses committed by servicemembers. *Supra* Part III.C.1. Under the statute before us, the element of force establishes the crime of aggravated sexual contact without including "lack of consent" as an additional element. *Supra* Parts III.C.1, D.2. Under the statutory framework set up by Congress, the prosecution may obtain a conviction upon a showing that the accused applied a certain amount of force and need not provide any evidence regarding the victim's state of mind. *Supra* Parts III.C.1., D.2. If evidence of consent is introduced, it may raise a reasonable doubt about the government's proof on the element of force. As such, the evidence of consent would be relevant to the determination of whether the government has proven the required elements beyond a reasonable doubt. *Supra* Part III.C.2.

The amended statute does not prohibit the consideration of consent evidence for that purpose. *Supra* Part III.C.2. The opportunity to consider evidence that may raise a reasonable doubt about an element does not shift the burden to the defense to disprove that element. *Supra* Part III.B. To the extent that evidence of consent may raise a reasonable doubt as to the element of force, the military judge has the authority to craft an appropriate instruction ensuring that the burden of proof remains with the government. *Supra* Part III.B. Consideration by a properly instructed panel of two different matters -- whether evidence of consent raises a reasonable doubt about the element of force, as well as whether evidence of consent

establishes an affirmative defense — does not render the statute unconstitutional. *Id.*

The present case is in an interlocutory posture. Consideration of the constitutional issues, as applied to Appellant, may be affected by factors such as the content of instructions, sequence of instructions, and waiver of instructions. Those matters have not been resolved at the trial level. At this point, it would be premature to conclude that the statute, as applied to Appellant, is unconstitutional.

IV. DECISION

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed. We remand the record of trial to the Judge Advocate General of the Navy for return to the military judge for further proceedings consistent with this opinion.

RYAN, J., with whom ERDMANN, J., joins (concurring in part and dissenting in part):

I agree with the majority that the procedural posture of this case does not bar us from exercising jurisdiction under Article 67(a)(2), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(2) (2006). However, I have a fundamental disagreement with how the majority chooses to interpret the language of Article 120, UCMJ, 10 U.S.C. § 920 (2006), itself.

The new Article 120, UCMJ, is neither a model of clarity nor a model statute. But while I agree that a potentially unconstitutional statute may be

construed in such a way that renders it constitutional (if such construction is plausible), *United States v. Neal*, __ M.J. __ (31-32) (C.A.A.F. 2010), this judicial band-aid does not change my point of disagreement with the majority because I do not believe their construction is plausible.

It is axiomatic that the government must prove all the elements of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). In my view, given the statute's definition of the relevant terms, making consent an affirmative defense under Article 120(r), UCMJ, relieves the government of this burden and unconstitutionally requires the defendant to disprove force – at least where an accused is charged with aggravated sexual contact using force (or any other offense under Article 120, UCMJ, alleging the use of force). This Congress may not do.

"Force" and "consent," as defined by Article 120, UCMJ, are two sides of the same coin. *Compare* Article 120(t)(5), UCMJ (defining "force" as "action to compel submission of another or to overcome or prevent another's resistance"), *with* Article 120(t)(14), UCMJ (defining "consent" as "words or overt acts indicating a freely given agreement to the sexual conduct"). As a matter of logic I would not have thought that anyone would agree that a person can be "forced" to do something the person has consented to or that "consent" can be compelled. The concepts are diametric opposites and, in my view, cannot coexist with respect to the same action – which is the problem with holding that the burden to prove consent in this case is on Appellant.

While it is constitutionally permissible to allocate to a defendant the burden of proving an affirmative defense, this is true only so long as the allocation

does not relieve the government of its burden. *Martin v. Ohio*, 480 U.S. 228, 234 (1987); *Patterson v. New York*, 432 U.S. 197, 215 (1977). Merely labeling something an affirmative defense does not automatically give it the qualities necessary to pass constitutional muster. *United States v. Clemons*, 843 F.2d 741, 752 (3d Cir. 1988); 1 Wayne R. LaFave, *Substantive Criminal Law* § 1.8(c), at 86 (2d ed. 2003).

Under Article 120, UCMJ, "aggravated sexual contact" involves engaging in a sexual act by, among other things (and as charged against Appellant), "using force against [another] person."

> The term 'force' means action to compel submission of another or to overcome or prevent another's resistance by --
>
> (A) the use or display of a dangerous weapon or object;
>
> (B) the suggestion of possession of a dangerous weapon or object that is used in a manner to cause another to believe it is a dangerous weapon or object; or
>
> (C) physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct.

Article 120(t)(5), UCMJ. If charged with this crime, an accused is permitted to raise consent as an affirmative defense. Article 120(r), UCMJ. "The term 'consent' means words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person." Article 120(t)(14), UCMJ.

The majority lists the elements of aggravated sexual contact set forth in the statute, notes that the word "consent" does not appear as an element, and is satisfied. ___ M.J. at ___ (18-20, 28, 30, 39). But the majority fails to reconcile the statutory text as a whole: "force" is more than just a particular type and quantum of physical exertion. *But see id.* at ___ (29, 40). Rather, Congress has defined the term such that it requires a compelling of submission, or an overcoming or preventing of resistance by any of the means listed in Article 120(t)(5)(A)-(C), UCMJ.

Neither compelled submission nor resistance are defined in the statute and therefore must be given their ordinary meanings. To "compel" is "to drive or urge forcefully or irresistibly" or "to cause to do or occur by overwhelming pressure." *Merriam-Webster's Collegiate Dictionary* 253 (11th ed. 2008). To "submit" is "to yield oneself to the authority or will of another"; "surrender" is a synonym. *Id.* at 1244. To "resist" is "to exert force in opposition" or "to exert oneself so as to counteract or defeat." *Id.* at 1060. Taken together, these definitions imply an authority, will, or force that is imposed on another and that is in opposition to the true will of the one imposed upon. Given the statute's focus on submission and resistance, then, evidence of consent presented by the defendant — i.e., evidence of "words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person," Article 120(t)(14), UCMJ — necessarily and directly disproves a required element of the crime.

Article 120(t)(16), UCMJ, defines an "affirmative defense" as "any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts."

Accord Rule for Courts-Martial (R.C.M.) 916(a); R.C.M. 916(a) Discussion; *United States v. Petty*, 132 F.3d 373, 378 (7th Cir. 1997). But the defense here is not an ordinary affirmative defense. *See Martin*, 480 U.S. at 235 (upholding affirmative defense of "self-defense" in murder prosecution because state courts interpreted elements of murder in way that made it possible for all elements of the crime to coexist with self-defense); *Patterson*, 432 U.S. at 206-07 (upholding affirmative defense of "extreme emotional disturbance" in murder prosecution because defense "[did] not serve to negative any facts of the crime which the State is to prove in order to convict"); *Farrell v. Czarnetzky*, 566 F.2d 381, 382 (2d Cir. 1977) (upholding unloaded-weapon defense in robbery prosecution because "possession of a weapon actually capable of causing death [was] not a necessary ingredient of the offense"). Rather than allowing a defendant to commit the objective elements of the offense but nonetheless escape liability, consent entirely negates an element of aggravated sexual contact using force: there could be no force, as defined in the statute, where the victim assented to the conduct.[1] "[T]he sole significance of the defendants' evidence concerning the so-called 'affirmative defense' [of consent] is to create a reasonable doubt about the existence of an element of the offense," *Humanik v. Beyer*, 871 F.2d 432, 440 (3d Cir. 1989) — namely, force.

A defendant may not be required to bear the burden of proof on a defense that "'negative[s] guilt

[1] This does not encompass situations where the victim may give some indication of assent but cannot legally "consent" under the provisions of Article 120(t)(14), UCMJ.

by cancelling out the existence of some required element of the crime.'" *Clemons*, 843 F.2d at 752 (quoting 1 Wayne LaFave & Austin Scott, *Substantive Criminal Law* § 1.8(c), at 71, 75 (1986)). "Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause." *Patterson*, 432 U.S. at 215.

Burden allocation is of fundamental importance: "[W]here one party has at stake an interest of transcending value -- as a criminal defendant his liberty -- th[e] margin of error is reduced as to him by the process of placing on the [government] the burden . . . of persuading the factfinder . . . of his guilt beyond a reasonable doubt." *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958). But "where the defendant is required to prove [or disprove a] critical fact in dispute" in a criminal proceeding, "the likelihood of an erroneous . . . conviction," increases. *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975). This is why the Supreme Court has reaffirmed the reasonable-doubt standard time and again and why courts must remain vigilant in upholding the standard against legislative schemes that require defendants to persuade the factfinder as to the elements of a crime. *See Martin*, 480 U.S. at 233-34; *Patterson*, 432 U.S. at 207, 210; *Mullaney*, 421 U.S. at 701.

Article 120, UCMJ, unconstitutionally burdens the defendant with disproving an element of the government's case. I respectfully dissent.

APPENDIX B

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
THE COURT EN BANC

UNITED STATES OF AMERICA

v.

RAYMOND L. NEAL
AVIATION ELECTRONICS TECHNICIAN
AIRMAN (E-3), U.S. NAVY

NMCCA 200800746

Review Pursuant to Article 62(b), Uniform Code of Military Justice, 10 U.S.C. § 862(b).

Military Judge: CDR Mario De Oliveira, JAGC, USN.
Convening Authority: Commanding Officer, Center for Naval Aviation, Technical Training Unit, Keesler AFB, MS.
For Appellant: Maj Elizabeth Harvey, USMC.
For Appellee: LT Dillon Ambrose, JAGC, USN.

31 March 2009

PUBLISHED OPINION OF THE COURT

PRICE, J., delivered the opinion of the court in which O'TOOLE, C.J., FELTHAM, GEISER, VINCENT and COUCH, S.JJ., and KELLY, STOLASZ, MAKSYM and BOOKER, JJ., concur.

PRICE, Judge:

This case is before us on a Government interlocutory appeal, pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862. The Government contends the military judge erred as a matter of law and fact by dismissing the charge of aggravated sexual contact after concluding the affirmative defense of consent unconstitutionally shifts the burden of proof on an element of the offense to the accused. Record at 1023-24; *see* Arts. 120(c), (r), (t)(14), and (t)(16), UCMJ.

After considering the record of proceedings, the parties' pleadings, and the oral arguments of counsel, we conclude that in this aggravated sexual contact prosecution, proof of the element of force does not require proof of "lack of consent," and that the affirmative defense of consent does not unconstitutionally shift the burden of proof to the defense. *See* Arts. 120(c), (r), (t)(14), and (t)(16), UCMJ. Accordingly, we grant the Government's interlocutory appeal.

I. Background

The appellee was charged with aggravated sexual

contact in violation of Article 120(e), UCMJ. The alleged sexual misconduct occurred on 08 December 2007 and was charged under the recently revised Article 120, UCMJ.[1] The charge and sole specification were referred to a special court-martial. Following arraignment and entry of pleas, the appellee moved to dismiss the charge alleging four constitutional defects.[2]

Following argument, the military judge ruled against the appellee on the first three alleged defects, but reserved ruling on the fourth. Appellate Exhibit XIX. He noted the affirmative defense of consent, as defined in Articles 120(r) and (t)(16),

[1] Prior to 01 October 2007, this misconduct was chargeable under Article 134, UCMJ, as indecent assault, and the Government was required to prove the act occurred without the victim's lawful consent. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶¶ 54c(1)(a) and 63c. The Fiscal Year 2006 National Defense Authorization Act (NDAA) revised military law by consolidating most sexual misconduct offenses under Article 120, UCMJ, and is applicable to offenses committed on or after 01 October 2007. MCM, Drafter's Analysis of Punitive Articles, A23-15 (2008 ed.). *See* NDAA for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3257-63 (codified as amended at 10 U.S.C. § 920).

[2] The four alleged defects include: (1) the Article 120, UCMJ, affirmative defense of consent includes an unconstitutional "double burden shift"; (2) the military judge's determination as to whether the accused met his burden of proof under the affirmative defense of consent undermines his right to trial by members; (3) a single fact finder cannot decide, as an interlocutory matter, whether the accused met his burden of proof regarding the affirmative defense of consent and satisfy procedural due process requirements; and (4) the Article 120, UCMJ, affirmative defense of consent unconstitutionally forces the accused to disprove an element of the offense. Appellate Exhibits XVII - XIX.

UCMJ, appeared unconstitutional, but deferred ruling until after consideration of the evidence necessary to determine if consent was an issue. AE XIX at 9, 11, 13, 15-16.

After the Government and the defense presented their evidence on the merits and the Government completed its case in rebuttal, both parties rested. The military judge then revisited the defense motion to dismiss the charge. Following additional argument from counsel, the military judge concluded that the appellee's testimony raised the affirmative defense of consent, that the affirmative defense of consent was "element based," and that the "statute's reference to force logically required the government to prove lack of consent." Record at 1016-23. He then granted the defense motion to dismiss. *Id.* at 1024.[3]

The military judge informed the members he had dismissed the charge, stating "[y]ou have now completed your duties, and are discharged with my most sincere thanks," and adjourned the court-martial. *Id.* at 1026-29.

The Government provided written notice of intent to appeal the military judge's ruling the next day and docketed the appeal with this court within 20 days of that notice.

II. Standard of Review

[3] The military judge supplemented his ruling with additional findings of fact and conclusions of law in response to this court's order. N.M.Ct.Crim.App. Order of 18 Dec 2008; Military Judge's ruling granting the defense motion of 29 Dec 2008 at 11, 13-18.

In reviewing a Government interlocutory appeal, this court may act only on matters of law. Art. 62(b), UCMJ; *see United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007), *cert. denied*, _ U.S. _, 127 S. Ct. 3029 (2007). The military judge's legal conclusions regarding the constitutionality of Article 120, UCMJ, are questions of law we review *de novo*. *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000) (citation omitted).

III. Jurisdiction of this Court

As a preliminary matter, the appellee argues this court lacks jurisdiction to hear this appeal. He asserts that: (1) the Government's failure to request a delay during trial in accordance with the "mandatory procedural requirements" of RULE FOR COURTS-MARTIAL 908(b)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) resulted in waiver of the right to appeal when the military judge subsequently dismissed the charge, the members, and the case; (2) this court has no jurisdiction as the military judge's "discharge" of the members created a *fait accompli*, and Article 62, UCMJ, precludes appeal of completed courts-martial; and (3) since the military judge discharged the members, any decision of this court would be without legal effect and merely advisory as retrial by the original court-martial is impossible.

The appellee cites no authority, and we have found no authority, which supports his assertion that the Government's failure to request delay to determine whether to file notice of appeal deprives the Government of the right to appeal or this court of jurisdiction. R.C.M. 908(b)(1). The military judge's ruling dismissing the sole charge and

specification terminated the proceedings with respect to that charge, and was properly subject to Government appeal. Art. 62(a)(1)(A), UCMJ; R.C.M. 908(a). The military judge's statement to the members that they were "discharged" following "termination of the proceedings" does not deprive this court of jurisdiction to determine this Government appeal. We decline to address the legal efficacy of potential future proceedings as not ripe for review. *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003).

Accordingly, we conclude the Government provided the military judge timely written notice of appeal and timely filed the appeal with this court, and that we have jurisdiction to rule on the appeal. *See* Arts. 62(a)(2) and (b), UCMJ; R.C.M. 908(b)(3) and (b)(4).[4]

IV. The Issues on Appeal

The issues presented in this Government appeal are: (1) In this aggravated sexual contact prosecution does proof of the element of force require the Government to prove "lack of consent?" and (2) Does the affirmative defense of consent unconstitutionally shift the burden of proof to the defense? *See* Arts. 120(a), (c),[5] (r), and (t)(16),

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[4] *See also United States v. Browers*, 20 M.J. 356, 359 n.4 (C.M.A. 1985)(timely filing of notice of appeal transfers jurisdiction over matters involved from trial court to appellate court); *United States v. Flores-Galarza*, 40 M.J. 900, 905 (N.M.C.M.R. 1994)(72 hour limit for serving written notice of Article 62 appeal jurisdictional)(citations omitted).

[5] "Aggravated Sexual Contact. Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate [Article 120] (a)(rape)

UCMJ; *see also Wright*, 53 M.J. at 481-83 (citations omitted). We will review these issues *de novo*. *Wright*, 53 M.J. at 478.

The Government argues that the military judge erred by dismissing the charge of aggravated sexual contact based upon an erroneous view of the facts and the law. The Government alternatively contends that the evidence did not raise the affirmative defense of consent and was admissible solely to negate the element of force or, if the affirmative defense was raised, the military judge erred in finding the statute unconstitutionally required the appellee to disprove the element of force. The Government also asserts that the military judge incorrectly interpreted the statute by not separating the affirmative defense of consent from the elements of Article 120(e), so as to read the statute in a constitutional manner.

The appellee argues the military judge correctly determined that the affirmative defense of consent unconstitutionally requires the appellee to disprove the element of force. The appellee also asserts that "consent is, by definition, inextricably intertwined with the element of force," and that Article 120(r),

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had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct." Art. 120(e), UCMJ. To prove aggravated sexual contact, the Government must prove the accused caused or engaged in the sexual contact by: (1) using force; (2) causing grievous bodily harm; (3) threatening or placing another in fear that another will be subject to death, grievous bodily harm or kidnapping; (4) rendering the putative victim unconscious; or (5) administering a substance that substantially impairs the putative victim's ability to appraise or control conduct. Arts. 120(a)(1)-(5) and (e), UCMJ.

UCMJ, unconstitutionally limits consideration of evidence of consent to the affirmative defense, while precluding consideration of this evidence in negation of the force element.

Although the interaction of the allocation of burdens articulated in the final two sentences of Article 120(t)(16), UCMJ, including the Military Judges' Benchbook instruction, and the constitutionality of the final sentence of Article 120(t)(16), UCMJ, were widely discussed within the Government's pleadings and during oral argument, these issues were not a subject of the ruling appealed by the Government, and are not before this court.[6] Government's Reply of 21 Nov 2008 at 11, 13; Government's Supplemental Brief of 16 Jan 2009 at 7-8; Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at 72-73, Note 10 (Interim Changes since Ch-2, 15 Jan 2008); *see* Art. 62, UCMJ; *Chisholm*, 59 M.J. at 152. We leave that controversy for another day.

As a preliminary matter, we conclude the appellee's testimony raised the affirmative defense of consent. AE XIX; Military Judge's Ruling Granting the Defense Motion of 29 Dec 2008 at 3-5, ¶ 2h(1)-(6); *see* Arts. 120(r), (t)(5), and (t)(16),

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[6] "*Affirmative defense*. The term 'affirmative defense' means any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or, partially, criminal responsibility for those acts. **The accused has the burden of proving the affirmative defense by a preponderance of the evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist.**" Art. 120(t)(16), UCMJ (emphasis added).

UCMJ; *United States v. Hibbard*, 58 M.J. 71, 72-3 (C.A.A.F. 2003).

A. To prove "force," must the Government prove "lack of consent?"

(1) Lack of consent is not identified as an element of the offense

"It is well established that when the statute's language is plain, the sole function of the courts--at least where the disposition required by the text is not absurd--is to enforce it according to its terms." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004)(citation and internal quotation marks omitted); *see also United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007).

Prior to the revision of Article 120, UCMJ, the Government was required to prove "lack of consent" as an element of offenses under Article 120, UCMJ, and indecent assault under Article 134, UCMJ.[7] "Lack of consent" is not, however, an explicitly identified element of the new offense of aggravated sexual contact. Arts. 120(a) and (e), UCMJ. As a result, in this case, the Government is only required to prove two elements, by legal and competent evidence beyond a reasonable doubt:

> (1) The appellee engaged in sexual contact with the alleged victim [LF]; and
>
> (2) The appellee did so by using force

[7] MCM (2005 ed.), Part IV, ¶¶ 45a(a) and b(1)(b), 54c(1)(a), and 63b(1).

against [LF].

Art. 120(e), UCMJ; MCM (2008 ed.), Part IV, ¶ 45b(5)(a).

The revised Article 120, UCMJ, omits "lack of consent" as an element of virtually all sexual misconduct offenses, including the charged offense.[8] This revision brought UCMJ sexual misconduct provisions into alignment with similar provisions applicable in the United States District Courts. *See* MCM (2008 ed.), Analysis of Punitive Articles, A23-15; *see also* 18 U.S.C. §§ 2241 and 2244 (Elements of Aggravated Sexual Abuse/Abusive sexual contact: (1) knowingly cause another person to engage in sexual act/contact, (2) by using force against that person).[9]

The limited legislative history suggests this revision was intended to focus the finder of fact on the accused's conduct, instead of the victim's conduct or state of mind.[10] The text of the revision reflects this change in focus by expressly stating that:

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[8] Lack of permission is an element of the offense of wrongful sexual contact. Arts. 120(m) and (r), UCMJ; MCM (2008 ed.), Part IV, ¶ 45b(13)(b).

[9] *See also United States v. Martin*, 528 F.3d 746, 752-53 (10th Cir. 2008) (prosecution under 18 U.S.C. § 2241(a) requires Government prove force, this is all the proof of non consent the statute demands); *United States v. Rivera*, 43 F.3d 1291, 1298 (9th Cir. 1995)(prosecution need not introduce evidence of lack of consent; 18 U.S.C. § 2241 does not incorporate traditional rape law doctrine of consent).

[10] MCM (2008 ed.), Analysis of Punitive Articles, A23-15; *see* 18 U.S.C.S. §§ 2241-2245; 151 CONG. REC. H12220 (December 18, 2005)(statement of Rep. Sanchez); Markup of the Defense Authorization Bill: Hearing before the Military Personnel Subcommittee of the House Armed Services Committee, (May 11, 2005)(statement of Rep. McHugh).

"[C]onsent [is] not an issue . . . except [it is] an affirmative defense for the sexual conduct in issue in a prosecution [for aggravated sexual contact]," and the assignment to the accused of the burden of proving the affirmative defense of consent by a preponderance of the evidence. Arts. 120(r) and (t)(16), UCMJ.

We must assume Congress intended and understood the effect of omitting "lack of consent" as an element of the offense. *See United States v. Wilson*, 66 M.J. 39, 46 (C.A.A.F. 2008).

(2) Force and consent are distinct terms

The revised statute defines force and consent differently and, although often related, the two terms are not "inextricably intertwined" in Article 120(e), UCMJ. The term "force" is defined in Article 120(t)(5), UCMJ, as including:

> [A]ction to compel submission of another or to overcome or prevent another's resistance by . . . (C) physical . . . strength . . . applied to another person, sufficient that the other person could not . . . escape the sexual conduct

"Consent," on the other hand, is defined in Article 120(t)(14), UCMJ, as:

> [W]ords or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical

> resistance or submission resulting from the accused's use of force, threat of force, or placing another person in fear does not constitute consent. . . .

The definition of "force" focuses upon the conduct of the accused, while the definition of "consent" focuses upon the words, acts and competence of the putative victim. This distinction is consistent with Congress' intent for the revision of Article 120, UCMJ.

While potentially related, force and consent are not two sides of the same coin or "inextricably intertwined," as asserted by the appellee. While some evidence may be relevant both to force and consent, one need not necessarily cause or flow from the other. The Government is required to prove the element of force, beyond a reasonable doubt. In so doing, the Government may, or may not, introduce evidence of the victim's consent or lack thereof. Similarly, consent has several relevant aspects which may, or may not, be related to the degree of force applied by an accused.

Consent must be a manifestation indicating agreement, freely given, by a competent person, to certain sexual conduct. Art. 120(t)(14). In order to meet the burden of proving the affirmative defense of consent by a preponderance of the evidence, an accused is entitled to present relevant evidence which may include the putative victim's manifestations of consent through words or overt actions. The defense can potentially meet its burden without reference to any action, forcible or otherwise, by the accused.

Indeed, both force and valid consent could

potentially exist in the same case, if the facts or circumstances convinced the finder of fact that consent arose independently of, and was not caused by, the force. In such a case, facts involving force applied by an accused may, or may not, be relevant to consent, and in any event need not necessarily be addressed by the defense.

(3) Lack of consent need not be proven by the Government

Applying the first rule of statutory construction, we conclude that: (1) the statute's language is plain force and consent are distinct words with distinct meanings; (2) the burden of proving the element of force beyond a reasonable doubt is, and always remains, on the Government; and (3) "Lack of consent" is not an actual or implied element of the offense of aggravated sexual contact. The disposition required by the text of the statute is not "absurd," and courts are required to enforce these provisions according to their terms. Arts. 120(c), (t)(5) and (t)(14), UCMJ; *See Lamie*, 540 U.S. at 534. Hence, the military judge erred as a matter of law when he concluded the force element of Article 120(c) requires the Government to prove "lack of consent."

B. Does the affirmative defense of consent unconstitutionally shift the burden of proof to the accused?

The Due Process Clause of the Constitution protects the accused against conviction except upon the Government's proof, beyond a reasonable doubt, of each and every element necessary to constitute

the charged offense. U.S. Constitution, Amendment V. *In Re Winship*, 397 U.S. 358, 364 (1970); *United States v. Rodriguez Rivera*, 63 M.J. 372, 383 (C.A.A.F. 2006). In order to violate due process, the provisions of Article 120, UCMJ, related to the affirmative defense of consent to aggravated sexual contact must offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Wright*, 53 M.J. at 481 (citations and internal quotations omitted).

It is permissible to assign the burden of proving affirmative defenses to the accused, and due process is not violated simply because proof of an affirmative defense, on which the accused bears the burden of proof, may tend to negate an element of the crime. *Martin v. Ohio*, 480 U.S. 228, 234-36 (1987).[11] In revising Article 120, UCMJ, Congress omitted "lack of consent" as an element of most sexual offenses including aggravated sexual contact, identified consent as an affirmative defense, and assigned the burden of proof to the accused. This methodology is consistent with the holding in *Martin*, does not offend a fundamental principle of justice, and is not unprecedented in American jurisprudence. *See Martin*, 480 U.S. at 234-36; *see also* D.C. Code § 22-3007 (2008)(putative victim's consent is an affirmative defense to sexual misconduct prosecuted

[11] *See also* Art. 50a, UCMJ (accused must prove affirmative defense of lack of mental responsibility by clear and convincing evidence); 18 U.S.C.S. § 17; *Patterson v. New York*, 432 U.S. 197 (1977)(NY law requiring defendant in second degree murder prosecution to prove, by a preponderance of the evidence, defense of extreme emotional disturbance in order to reduce crime to manslaughter did not violate Due Process Clause of Fourteenth Amendment).

under §§ 22-3002 to 22-3006, which the accused must establish by a preponderance of the evidence).[12]

In addition, our conclusion that the Government is not required to prove "lack of consent" as an identified or implied element of aggravated sexual contact eradicates the primary basis supporting the military judge's conclusion that the statute, as revised, is unconstitutional. However, our analysis does not end here.

The appellee also contends the language of Article 120(r), UCMJ, that "consent [is not] an issue . . . except [it is] . . . an affirmative defense for the sexual conduct in issue in a prosecution under . . . subsection (c) aggravated sexual contact," unambiguously limits consideration of consent evidence to the affirmative defense, thus unconstitutionally precluding consideration of this evidence in "negation of [the element of force]." Appellee's Response of 10 Nov 2008 at 7. Article 120(r), UCMJ, is susceptible to alternative constructions, including that asserted by the appellee. We also agree the appellee's construction, if correct, would raise serious constitutional issues, as the Due Process Clause would be violated if the fact finder were precluded from considering evidence relevant to an affirmative defense in determining

[12] *Cf. State v. Buzzell*, 200 P.3d 287 (Wash.Ct.App. 2009)(citing *State v. Camera*, 781 P.2d 483, 487 (Wash. 1989)(while there is conceptual overlap between the consent defense to rape and the rape crime's element of forcible compulsion, the burden of proof on the consent defense is with the defendant)); *Harley v. Foltz*, 780 F.2d 1021 (6th Cir. 1985)(citing *People v. Stull*, 338 N.W.2d 403, 406-07 (Mich.Ct.App. 1983)(lack of consent is not an element of rape, but consent is an affirmative defense to rape)).

whether there is a reasonable doubt about the sufficiency of the Government's proof of the crime's elements. *Martin*, 480 U.S. at 233-34 (citing *In re Winship*, 397 U.S. at 364).[13]

However, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Jones v. United States*, 529 U.S. 848, 857 (2000)(citations omitted). Article 120(r), UCMJ, is susceptible to a reasonable, readily apparent, construction which avoids "grave and doubtful constitutional questions."

We interpret the words "consent [is] not an issue" as highlighting Congress' removal of "lack of consent" as an element that must be proven by the Government. Art. 120(r), UCMJ.[14] We also interpret the language "except [it is] an affirmative defense for the sexual conduct in issue in a prosecution under subsection [(c) aggravated sexual

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[13] *See also Patterson*, 432 U.S. at 201-07; *Cf. Leland v. Oregon*, 343 U.S. 790, 797 (1952); *Mozee v. United States*, 963 A.2d 154, 159 (D.C. 2009) (citing *Hicks v. United States*, 707 A.2d 1301, 1303 (D.C. 1998) and *Russell v. United States*, 698 A.2d 1007, 1015-16 (D.C. 1997)("[W]hen the legislature has not specified otherwise . . . the jury should be expressly instructed that it may consider the affirmative defense evidence when it determines whether the government has met its burden to prove all the elements of the offense beyond a reasonable doubt.")).

[14] *See generally* H.R. Rep. No. 99-594, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 6186, 6195 (victim's lack of consent [to aggravated sexual abuse] is not an element of the offense, and the prosecution need not introduce evidence of lack of consent); *Rivera*, 43 F.3d at 1298 (prosecution need not introduce evidence of lack of consent as 18 U.S.C. § 2241 does not incorporate traditional rape law doctrine of consent).

contact]" as reflecting establishment of the affirmative defense of consent to identified offenses including "aggravated sexual contact." Art. 120(r), UCMJ. To be clear, this construction is necessary to ensure the accused due process of law, as the finder of fact must be free to consider relevant, admissible evidence, including evidence going to the affirmative defense of consent, in determining whether there is a reasonable doubt about the sufficiency of the Government's proof as to the elements of the offense. *Martin*, 480 U.S. at 233-34.[5] This construction is also consistent with the plain language of the statute, and ensures appropriate deference to Congressional decision making in this area.

We conclude that assignment of the burden of proving the affirmative defense of consent to the accused is constitutionally permissible, in part because the finder of fact is free to consider evidence relevant to the affirmative defense of consent in determining whether there is a reasonable doubt about the sufficiency of the Government's proof on the element of force. *Martin*, 480 U.S. at 234-36. In this case, the military judge erred as a matter of law when he concluded that the affirmative defense of consent impermissibly shifted the burden of proof to the accused. The burden of proving force beyond a reasonable doubt is, and always remains, with the Government. Arts. 120(e), (r), and (0(16), UCMJ; *see Wright*, 53 M.J. at 481.

Conclusion

For the foregoing reasons, in this aggravated

[5] *See also Patterson*, 432 U.S. at 201-07; *Hicks*, 707 A.2d at 1303; *Russell*, 698 A.2d at 1015-16.

sexual contact prosecution, proof of the element of force does not require proof of "lack of consent," and the affirmative defense of consent does not unconstitutionally shift the burden of proof to the defense. *See* Arts. 120(e), (r), (t)(14), and (t)(16). The Government's interlocutory appeal is granted and the record is returned to the Judge Advocate General for action consistent with this opinion.

Chief Judge O'Toole, Senior Judges Feltham, Geiser, Vincent, and Couch, and Judges Kelly, Stolasz, Maksym, and Booker concur.

For the Court

R.H. TROIDL
Clerk of Court

APPENDIX C

UNITED STATES, Appellee
v.
Raymond L. NEAL, Appellant

USCA Dkt. No. 09-5004/NA
Crim. App. Dkt. No. 200800746

Order

On consideration of Appellant's petition for reconsideration of this Court's decision, United States v. Neal, 68 M.J. 289 (C.A.A.F. 2010), it is, by this Court, this 22nd day of February 2010,

ORDERED:

That said petition for reconsideration be, and the same is, hereby denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

Cc: The Judge Advocate General of the Navy
Appellate Defense Counsel [sic](AMBROSE)
Appellate Government Counsel [sic]
(HARVEY)

APPENDIX D

UNITED STATES CONSTITUTION

Amendment V

No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land and naval forces, or in the Militia, when in actual service, in time of War, or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E

10 USC § 920

Art. 120. Rape, sexual assault, and other sexual misconduct

(a) Rape. Any person subject to this chapter [10 USCS §§ 801 et seq.] who causes another person of any age to engage in a sexual act by—

(1) using force against that other person;

(2) causing grievous bodily harm to any person;

(3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;

(4) rendering another person unconscious; or

(5) administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct;

is guilty of rape and shall be punished as a court-martial may direct.

(b) Rape of a child. Any person subject to this chapter [10 USCS §§ 801 et seq.] who—

(1) engages in a sexual act with a child who has not attained the age of 12 years; or

(2) engages in a sexual act under the circumstances described in subsection (a) with a child who has attained the age of 12 years;

is guilty of rape of a child and shall be punished as a court-martial may direct.

(c) Aggravated sexual assault. Any person subject to this chapter [10 USCS §§ 801 et seq.] who—

(1) causes another person of any age to engage in a sexual act by—

(A) threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping); or

(B) causing bodily harm; or

(2) engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of—

(A) appraising the nature of the sexual act;

(B) declining participation in the sexual act; or

(C) communicating unwillingness to engage in the sexual act;

is guilty of aggravated sexual assault and shall be punished as a court-martial may direct.

(d) Aggravated sexual assault of a child. Any person subject to this chapter [10 USCS §§ 801 et seq.] who engages in a sexual act with a child who has attained the age of 12 years is guilty of aggravated sexual assault of a child and shall be punished as a court-martial may direct.

(e) Aggravated sexual contact. Any person subject to this chapter [10 USCS §§ 801 et seq.] who engages in or causes sexual contact with or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as

a court-martial may direct.

(f) Aggravated sexual abuse of a child. Any person subject to this chapter [10 USCS §§ 801 et seq.] who engages in a lewd act with a child is guilty of aggravated sexual abuse of a child and shall be punished as a court-martial may direct.

(g) Aggravated sexual contact with a child. Any person subject to this chapter [10 USCS §§ 801 et seq.] who engages in or causes sexual contact with or by another person, if to do so would violate subsection (b) (rape of a child) had the sexual contact been a sexual act, is guilty of aggravated sexual contact with a child and shall be punished as a court-martial may direct.

(h) Abusive sexual contact. Any person subject to this chapter [10 USCS §§ 801 et seq.] who engages in or causes sexual contact with or by another person, if to do so would violate subsection (c) (aggravated sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

(i) Abusive sexual contact with a child. Any person subject to this chapter [10 USCS §§ 801 et seq.] who engages in or causes sexual contact with or by another person, if to do so would violate subsection (d) (aggravated sexual assault of a child) had the sexual contact been a sexual act, is guilty of abusive sexual contact with a child and shall be punished as a court-martial may direct.

(j) Indecent liberty with a child. Any person subject to this chapter [10 USCS §§ 801 et seq.] who engages

an indecent liberty in the physical presence of a child—

(1) with the intent to arouse, appeal to, or gratify the sexual desire of any person; or

(2) with the intent to abuse, humiliate, or degrade any person;

is guilty of indecent liberty with a child and shall be punished as a court-martial may direct.

(k) Indecent act. Any person subject to this chapter [10 USCS §§ 801 et seq.] who engages in indecent conduct is guilty of an indecent act and shall be punished as a court-martial may direct.

(l) Forcible pandering. Any person subject to this chapter [10 USCS §§ 801 et seq.] who compels another person to engage in an act of prostitution with another person to be directed to said person is guilty of forcible pandering and shall be punished as a court-martial may direct.

(m) Wrongful sexual contact. Any person subject to this chapter [10 USCS §§ 801 et seq.] who, without legal justification or lawful authorization, engages in sexual contact with another person without that other person's permission is guilty of wrongful sexual contact and shall be punished as a court-martial may direct.

(n) Indecent exposure. Any person subject to this chapter [10 USCS §§ 801 et seq.] who intentionally exposes, in an indecent manner, in any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor's family or household, the genitalia, anus,

buttocks, or female areola or nipple is guilty of indecent exposure and shall by punished as a court-martial may direct.

(o) Age of child.

(1) Twelve years. In a prosecution under subsection (b) (rape of a child), subsection (g) (aggravated sexual contact with a child), or subsection (j) (indecent liberty with a child), it need not be proven that the accused knew that the other person engaging in the sexual act, contact, or liberty had not attained the age of 12 years. It is not an affirmative defense that the accused reasonably believed that the child had attained the age of 12 years.

(2) Sixteen years. In a prosecution under subsection (d) (aggravated sexual assault of a child), subsection (f) (aggravated sexual abuse of a child), subsection (i) (abusive sexual contact with a child), or subsection (j) (indecent liberty with a child), it need not be proven that the accused knew that the other person engaging in the sexual act, contact, or liberty had not attained the age of 16 years. Unlike in paragraph (1), however, it is an affirmative defense that the accused reasonably believed that the child had attained the age of 16 years.

(p) Proof of threat. In a prosecution under this section, in proving that the accused made a threat, it need not be proven that the accused actually intended to carry out the threat.

(q) Marriage.

(1) In general. In a prosecution under paragraph (2) of subsection (c) (aggravated sexual assault), or under subsection (d) (aggravated sexual assault of a

child), subsection (f) (aggravated sexual abuse of a child), subsection (i) (abusive sexual contact with a child), subsection (j) (indecent liberty with a child), subsection (m) (wrongful sexual contact), or subsection (n) (indecent exposure), it is an affirmative defense that the accused and the other person when they engaged in the sexual act, sexual contact, or sexual conduct are married to each other.

(2) Definition. For purposes of this subsection, a marriage is a relationship, recognized by the laws of a competent State or foreign jurisdiction, between the accused and the other person as spouses. A marriage exists until it is dissolved in accordance with the laws of a competent State or foreign jurisdiction.

(3) Exception. Paragraph (1) shall not apply if the accused's intent at the time of the sexual conduct is to abuse, humiliate, or degrade any person.

(r) Consent and mistake of fact as to consent. Lack of permission is an element of the offense in subsection (m) (wrongful sexual contact). Consent and mistake of fact as to consent are not an issue, or an affirmative defense, in a prosecution under any other subsection, except they are an affirmative defense for the sexual conduct in issue in a prosecution under subsection (a) (rape), subsection (c) (aggravated sexual assault), subsection (e) (aggravated sexual contact), and subsection (h) (abusive sexual contact).

(s) Other affirmative defenses not precluded. The enumeration in this section of some affirmative defenses shall not be construed as excluding the existence of others.

(t) Definitions. In this section:

(1) Sexual act. The term "sexual act" means--

(A) contact between the penis and the vulva, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or

(B) the penetration, however slight, of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(2) Sexual contact. The term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.

(3) Grievous bodily harm. The term "grievous bodily harm" means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose. It is the same level of injury as in section 928 (article 128) of this chapter [10 USCS § 928], and a lesser degree of injury than in section 2246(4) of title 18 [18 USCS § 2246(4)].

(4) Dangerous weapon or object. The term "dangerous weapon or object" means--

(A) any firearm, loaded or not, and whether operable or not;

(B) any other weapon, device, instrument,

material, or substance, whether animate or inanimate, that in the manner it is used, or is intended to be used, is known to be capable of producing death or grievous bodily harm; or

(C) any object fashioned or utilized in such a manner as to lead the victim under the circumstances to reasonably believe it to be capable of producing death or grievous bodily harm.

(5) Force. The term "force" means action to compel submission of another or to overcome or prevent another's resistance by--

(A) the use or display of a dangerous weapon or object;

(B) the suggestion of possession of a dangerous weapon or object that is used in a manner to cause another to believe it is a dangerous weapon or object; or

(C) physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct.

(6) Threatening or placing that other person in fear. The term "threatening or placing that other person in fear" under paragraph (3) of subsection (a) (rape), or under subsection (e) (aggravated sexual contact), means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to death, grievous bodily harm, or kidnapping.

(7) Threatening or placing that other person in fear.

(A) In general. The term "threatening or placing that other person in fear" under paragraph (1)(A) of subsection (c) (aggravated sexual assault), or under subsection (h) (abusive sexual contact), means a

communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another being subjected to a lesser degree of harm than death, grievous bodily harm, or kidnapping.

(B) Inclusions. Such lesser degree of harm includes--

(i) physical injury to another person or to another person's property; or

(ii) a threat--

(I) to accuse any person of a crime;

(II) to expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or

(III) through the use or abuse of military position, rank, or authority, to affect or threaten to affect, either positively or negatively, the military career of some person.

(8) Bodily harm. The term "bodily harm" means any offensive touching of another, however slight.

(9) Child. The term "child" means any person who has not attained the age of 16 years.

(10) Lewd act. The term "lewd act" means--

(A) the intentional touching, not through the clothing, of the genitalia of another person, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; or

(B) intentionally causing another person to touch, not through the clothing, the genitalia of any person with an intent to abuse, humiliate or degrade any person, or to arouse or gratify the sexual desire of any person.

(11) Indecent liberty. The term "indecent liberty" means indecent conduct, but physical contact is not required. It includes one who with the requisite

intent exposes one's genitalia, anus, buttocks, or female areola or nipple to a child. An indecent liberty may consist of communication of indecent language as long as the communication is made in the physical presence of the child. If words designed to excite sexual desire are spoken to a child, or a child is exposed to or involved in sexual conduct, it is an indecent liberty; the child's consent is not relevant.

(12) Indecent conduct. The term "indecent conduct" means that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. Indecent conduct includes observing, or making a videotape, photograph, motion picture, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material, without another person's consent, and contrary to that other person's reasonable expectation of privacy, of--

(A) that other person's genitalia, anus, or buttocks, or (if that other person is female) that person's areola or nipple; or

(B) that other person while that other person is engaged in a sexual act, sodomy (under section 925 (article 125) [10 USCS § 925]), or sexual contact.

(13) Act of prostitution. The term "act of prostitution" means a sexual act, sexual contact, or lewd act for the purpose of receiving money or other compensation.

(14) Consent. The term "consent" means words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or

physical resistance or submission resulting from the accused's use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent. A person cannot consent to sexual activity if--

(A) under 16 years of age; or

(B) substantially incapable of--

(i) appraising the nature of the sexual conduct at issue due to--

(I) mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or otherwise; or

(II) mental disease or defect which renders the person unable to understand the nature of the sexual conduct at issue;

(ii) physically declining participation in the sexual conduct at issue; or

(iii) physically communicating unwillingness to engage in the sexual conduct at issue.

(15) Mistake of fact as to consent. The term "mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, which would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care

is what a reasonably careful person would do under the same or similar circumstances. The accused's state of intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense.

(16) Affirmative defense. The term "affirmative defense" means any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts. The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist.